80-366

No. .....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GREAT LAKES INTERNATIONAL, INC.,
Petitioner,

—against—

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION; SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS AND DEPUTY ASSISTANT SECRETARY FOR MARITIME AFFAIRS; ROBERT J. PATTON, JR., SECRETARY OF THE MARITIME ADMINISTRATION; NATIONAL DREDGING, INC.; UNITED STATES CORPORATION COMPANY; JACKMAN & COMPANY; DAVID H. JACKMAN; STUYVESANT DREDGING, INC.; ROYAL BOS KALIS WESTMINSTER GROUP N.V.; WILLIAMS-MCWILLIAMS CO., INC.; UNITED STATES TRUST COMPANY OF NEW YORK and WARBURG PARIBAS BECKER INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the court below erred in holding that petitioner, an American citizen owning and operating vessels which constitute a part of the United States Merchant Marine, is outside the zone of interests of the Merchant Marine Act of 1936, as amended, and therefore lacks standing under the Administrative Procedure Act to seek injunctive and declaratory relief with respect to the actions of the Maritime Administration, and others, in violation of the Merchant Marine Act of 1936, as amended, and other related statutes, which actions will cause immediate and irreparable injury to petitioner's commercial and maritime interests.

2. Whether the court below erred in looking solely to the legislative history of an amendment to Title XI of the Merchant Marine Act of 1936, as amended, and in determining thereupon the purpose of the statute to be other than that clearly stated in the statutory language.

3. Whether the Merchant Marine Act of 1936, as amended, is part of a statutory scheme having a unified Congressional purpose of protecting the domestic merchant marine from foreign competition, which must be examined in determining the relevant zone of interests for standing purposes.

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GREAT LAKES INTERNATIONAL, INC.,

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SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION; SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS AND DEPUTY ASSISTANT SECRETARY FOR MARITIME AFFAIRS; ROBERT J. PATTON, JR., SECRETARY OF THE MARITIME ADMINISTRATION; NATIONAL DREDGING, INC.; UNITED STATES CORPORATION COMPANY; JACKMAN & COMPANY; DAVID H. JACKMAN; STUYVESANT DREDGING, INC.; ROYAL BOS KALIS WESTMINSTER GROUP N.V.; WILLIAMS-MCWILLIAMS CO., INC.; UNITED STATES TRUST COMPANY OF NEW YORK and WARBURG PARIBAS BECKER INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Parties to Proceeding Below

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed.

Opinion Below

The order of the court of appeals, affirming the order of the District Court for the Southern District of New York which granted summary judgment dismissing the complaint, is not reported.

Jurisdiction

The order of the court of appeals was dated and entered on June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The following statutes, which are set forth verbatim in the appendix hereto, are involved in this case:

33 U.S.C. §§ 622, 624 (1976) (Supp. II 1978)
46 U.S.C. § 802
46 U.S.C. § 861
46 U.S.C. § 883
46 U.S.C. § 1101
46 U.S.C. §§ 1271-1280

Statement of the Case

In this action for judicial review of administrative action under the Administrative Procedure Act, petitioner seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, and injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure. The jurisdiction of the district court was invoked under the provisions of 28 U.S.C. § 1331(a). The action arose under the laws of the United States, specifically, Title XI of the Merchant Marine Act of 1936, as amended, and related statues, involves more than $10,000 and is brought against an agency and officers of the United States in their official capacities, among other defendants.

In dismissing and affirming the dismissal of the complaint, the courts below properly assumed the truth of the following allegations of petitioner:

Petitioner, through a wholly owned and other subsidiaries, is engaged in the dredging and marine construction industry throughout the United States and elsewhere. (R.1, Complaint, ¶ 4).* It competes for, and performs, on a regular basis, dredging contracts let by the Department of the Army, United States Corps of Engineers, and others, (*id.*), and in this connection, owns numerous dredges which constitute a part of the domestic Merchant Marine of the United States, and which have been acquired by the investment of millions of dollars over a period of years. (R.1, ¶¶ 37, 50, 59).

Sometime prior to early 1979, respondent, Royal Bos Kalis Westminster Group N.V. ("Bos Kalis"), a Netherlands corporation and the largest dredging firm in the world, (R.1, ¶¶ 15, 43), decided to enter the American market, and in this connection, to construct the largest, most technologically advanced hopper dredge in America, Avondale Shipyards Hull No. 2332 (the "Dredge"),** and to seek financing assistance from the United States government, pursuant to Title XI of the Merchant Marine Act of 1936 (46 U.S.C. §§ 1271 *et seq.*). (R.1, ¶¶ 45-47). As a non-citizen of the United States, however, Bos Kalis is excluded from the domestic merchant marine, of which dredging is a part, since the domestic trade is limited to American built vessels, owned, documented and operated by citizens of the United States, and Title XI financing is available only to aid in the construction of American built

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* All references to "R" are to the record; document numbers are those in the index of docket entries prepared by the Clerk of the United States Court of Appeals for the Second Circuit. In accordance with Supreme Court Rule 19.1, on July 17, 1980, petitioner served and filed a written request to said Clerk to certify and transmit the record to this Court.

** Legal title to the Dredge is to be in respondent United States Trust Company as owner-trustee.

vessels to be owned and operated by citizens of the United States.

In order to circumvent these obstacles, Bos Kalis caused the formation of two Delaware corporations, respondent Stuyvesant Dredging, Inc. ("Stuyvesant"), a wholly owned subsidiary of Bos Kalis, (R.1, ¶¶ 14, 15, 44-47), and respondent National Dredging, Inc. ("National"), (R.1, ¶¶ 10, 44-47). Bos Kalis proposes to enter the United States dredging market, despite the disability of non-citizenship, by means of a series of proposed agreements which are to provide that the Dredge is to be bareboat (demise) chartered to National and time chartered by National to Stuyvesant, (R.1, ¶ 45), both of which were formed solely for the purpose of entering into these charters. (R.1, ¶¶ 10, 15, 44-45). Although a proposed management agreement states that respondent Williams-McWilliams Co., Inc. ("Williams-McWilliams") is to manage the Dredge, (R.1, ¶ 55), an analysis of the various agreements reveals that in fact, exclusive control of the Dredge will lie in Bos Kalis, through Stuyvesant, and that the "time charter" to Stuyvesant is in fact and law a complete demise charter, prohibited by applicable regulations (R.1, ¶¶ 54-59).

National was formed, as noted, at the behest of Bos Kalis, for the sole purpose of bareboat chartering the Dredge from the owner-trustee, (R.1, ¶¶ 10, 45), by respondent United States Corporation Company ("USCC"), (*id.*), a New York corporation admittedly engaged exclusively in the business of furnishing, for lawyers only, services relating to corporations, and not in the business of owning or operating dredges or any other vessels. (R.20, Jackman affidavit, ¶¶ 2-3).

All of National's stock is owned by defendant Jackman & Company, (R.1, ¶ 12; R.20, ¶ 4), a partnership composed entirely of officers and employees of USCC which acts as

a holding company solely at the designation of and pursuant to the directions of USCC. (R.1, ¶ 12). The president of National, respondent David H. Jackman, is a partner in Jackman & Company, and the controlling stockholder of USCC. (R.1, ¶ 12).

Despite the fact that respondent United States Department of Commerce, Maritime Administration ("MarAd") was on notice of the restrictive provisions preventing Jackman & Company from acting except in accordance with the instructions of USCC, (R.1, ¶¶ 25-27), and that USCC in voting National stock through Jackman & Company, was acting for an undisclosed principal who might or might not be a citizen, (R.1, ¶¶ 22-35), nonetheless, MarAd, on November 5, 1979, issued a preliminary conditional letter of approval of the transactions, in which it determined that National was a citizen eligible to be a bareboat charterer and an applicant for Title XI financing assistance, and that it possessed the "ability, experience, financial resources and other qualifications necessary to the adequate operation and maintenance of" the Dredge. (R.1, ¶ 33, Exhibit "4" thereto).

In summary, the formation of National and the agreements among respondents are part of a scheme to violate statutes and MarAd regulations, the sole purpose of which is to enable the private respondents to build, with the assistance of the Government, a dredge to be enrolled and licensed in the United States coastwise trade, in order to allow Bos Kalis to compete, through Stuyvesant, with petitioner and others in the United States dredging industry, from which it is excluded by law.

In the complaint, filed on December 19, 1979, petitioner sought an injunction restraining the Secretary of Commerce and MarAd from finally approving the application of National for Title XI financing assistance, from issu-

ing any guarantee or commitment to guarantee any financial obligations with respect to the construction of the Dredge, and from taking any other steps toward granting the application, and restraining the private respondents from entering into any financial and other contractual agreements and arrangements conditionally approved by the Government in connection with National's application and from taking any other steps toward fulfilling the conditions of the preliminary approval. Petitioner also sought a declaratory judgment that National is not a citizen of the United States within the meaning of the relevant statutes and does not possess the necessary qualifications to operate and maintain the vessel, and as a noncitizen is ineligible as an applicant for Title XI financing or as bareboat (demise) charterer of the Dredge, and holding unlawful and setting aside the conditional approval of National's application by the Government. (R.1, Prayer for Relief at 26-28).

Petitioner's complaint alleged three claims:

(1) MarAd did not have before it sufficient information on which to base its determination of National's citizenship and preliminary approval of the application, since the application contained material misrepresentations and omissions of material fact, and did not contain the proposed charter agreements, as required by applicable MarAd regulations, (46 C.F.R. §§ 298.3(a) and 298.10(a) (1979));

(2) National is not a citizen of the United States and is ineligible to be an applicant for Title XI assistance, (46 U.S.C. §§ 802, 1244(c), 1271(b), 1273(a), 1274(a)(1) and (b)(1)), or to be bareboat (demise) charterer of the Dredge, (46 U.S.C. §§ 802, 808; 46 C.F.R. §§ 221.7(a)(1) and 298.10(a) (1979); 40 Fed. Reg. 28832 (1975)), in that all of the beneficial owner-

ship and voting power of its stock is vested in Bos Kalis, through a chain of fiduciary obligations running from the nominee owner of all the National stock to Bos Kalis, through its counsel; and

(3) The so-called "time charter" to Stuyvesant is in fact and law a complete demise or bareboat charter, which may not lawfully be approved by the government respondents, (46 U.S.C. § 802; 46 C.F.R. § 221.7 (a)(1) (1979)),

each of which prohibited the government respondents from approving the National application. (46 C.F.R. § 298.10(a) (1979)).

Petitioner has alleged that as the direct and immediate result of such illegal agency action approving the charter agreements and the Title XI application, it will be placed in competition in the coastwise trade with the non-citizens Stuyvesant and Bos Kalis, who are excluded by law from the same. *See* 46 U.S.C. §§ 802, 808, 883. After reviewing the petitioner's affidavit and the voluminous affidavits of all respondents, (R.44, Transcript of Hearing, March 12, 1980, at 2), the district court specifically stated its assumption that the constitutional requirement of injury in fact had been established by petitioner's assertion of competitive injury. (*Id.*). However, on March 12, 1980, the district court, from the bench, granted summary judgment dismissing the complaint upon the ground that petitioner lacked standing under the zone of interests criterion, holding that "there is no evidence that Congress, in enacting Title XI, intended to protect anyone from competition or to create any monopolies," (R.44, at 3), and that "[t]he objective of Title XI . . . is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards." (R.44, at

4). With respect to the alleged violations of the citizenship requirements in Title XI, the district court held "[t]he citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war." (*Id.*).

The United States Court of Appeals for the Second Circuit did not disturb the district court's findings regarding injury in fact. On June 16, 1980, it affirmed the dismissal for lack of standing under the zone of interests criterion, but did so on the basis of a holding that the sole purpose of Title XI " 'is to encourage the use of private capital in the financing of ship construction.' " (R.57, Decision at 3).

Argument

1. Consideration of the application of the zone of interests criterion to the alleged violations of the Merchant Marine Acts of 1920, 1936 and 1938, as amended, the sole issue raised herein, necessitates a brief review of those statutes and the regulations thereunder. In §§ 1, 27 and 38 of the Merchant Marine Act of 1920, 46 U.S.C. §§ 861, 883 and 802, respectively, (the "Jones Act"), the coastwise trade of the United States, of which domestic dredging operations are a part, was reserved to citizens of the United States, in order to protect them from foreign competition in that trade. *See Central Vt. Transportation Co.* v. *Durning,* 294 U.S. 33, 36-40 (1935). *See also* 42 O.A.G. 189, 194 (August 7, 1963). With respect to corporations, the citizenship requirements in § 38 of the Jones Act are definite and detailed, in order to prevent the encroachment of foreign interests in the coastwise trade through covert ownership or control of American corporations. *See Douglas* v. *Seacoast Products,* 431 U.S. 265, 274 n. 11 (1975); *Chemical Bank New York Trust Co.* v. *SS. Westhampton,* 358 F.2d

574 (4th Cir. 1965), *cert. denied,* 385 U.S. 921 (1966); *Meacham Corp.* v. *United States,* 207 F.2d 535, 543 (4th Cir. 1953), *cert. dismissed,* 348 U.S. 801 (1954). In § 18 of the Jones Act, Congress forbade the charter to a non-citizen of any vessels of the United States without government approval. 46 U.S.C. § 808, ¶ 3. MarAd's current regulations forbid demise charters, such as that to National, to non-citizens. 46 C.F.R. § 221.7(a)(1) (1979). *See also* 40 Fed. Reg. 28832 (1975). Congress incorporated the citizenship requirements of 46 U.S.C. § 802 into the provisions of the Merchant Marine Act of 1936 in general, (46 U.S.C. § 1244(c)), and into Title XI in particular. *See* 46 U.S.C. §§ 1271(b), 1273(a), 1274(a)(1) and (b)(1). MarAd's Title XI regulations incorporate the citizenship requirements for applicants and demise charterers. 46 C.F.R. § 298.10(a) (1979). The Congressional declarations of policy in the Merchant Marine Acts of 1920 and 1936 express the same goal of fostering an American merchant marine ". . . owned and operated . . . by citizens of the United States." 46 U.S.C. §§ 861, 1101. The 1920 Act did so by excluding non-citizens from domestic employment, in §§ 27 and 38 of the Act, 46 U.S.C. §§ 883 and 802, respectively. *See Central Vt. Transportation Co.* v. *Durning, supra,* 294 U.S. at 38. The 1936 Act did so by extending financial assistance to citizens of the United States. *See* the discussion of the two acts in *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.,* —— U.S. ——, 100 S.Ct. 800, 802-03 (1980). In the last clause of 46 U.S.C. § 861, Congress directed the Secretary to administer all the shipping laws so as to promote that policy as the primary end to be attained.* The enacting clause of the Merchant Marine Act

* Petitioner's interest in remaining free of foreign competition in the coastwise trade is brought within the zone of interests protected by the shipping laws administered by MarAd, including Title XI, by virtue of the Congressional mandate in the last clause

of 1938, Pub. L. No. 75-705, 52 Stat. 953 (1938), of which Title XI is a part, states the purpose of the statute "to further promote" that policy. Petitioner's claims that National is ineligible as applicant and demise charterer of the Dredge and that the charter to Stuyvesant is a demise charter thus alleged violations of the Merchant Marine Acts of 1920, 1936 and 1938 and regulations thereunder, in contravention of the policies of the same.

2. It is undisputed in this action that Stuyvesant is a non-citizen, barred from owning and operating the Dredge, since it is a wholly owned subsidiary of Bos Kalis. With respect to the citizenship of National it is clear that all the stock in National is owned by Jackman & Company, which has no beneficial interest in such shares, and must exercise the voting rights of such stock only in accordance with the directions of USCC. USCC is acting in this transaction in the normal course of its service business, which is limited by law to acting as the agent of a licensed attorney. (New York Jud. Law § 495 (McKinney 1968); *In re Pace,* 170 App.Div. 818 (N.Y. 1915)). Uncontroverted evidence obtained by petitioner in the limited discovery available to it, indicates that USCC's principal is counsel for Bos Kalis. (Appendix 8 to R. 33, Plaintiff's Memorandum In Further Support of its Motion and in Opposition to Defendants' Motions for Summary Judgment). Thus, as a result of that chain of fiduciary obligations, Bos Kalis effectively controls 100% of the voting power in National. The government respondents admitted that they did not

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of 46 U.S.C. § 861, in precisely the same manner as environmental interests affected by otherwise unrelated federal action are protected in 42 U.S.C. § 4332 of the National Environmental Policy Act. *See United States* v. *SCRAP,* 412 U.S. 669, 686 n.13 (1973). Thus, petitioner satisfies the zone of interests criterion, even aside from the fact that the 1936 and 1938 Acts embodied the same protective purpose and policy as the 1920 Act.

consider the fact that National's stock is owned by a fiduciary, and have refused to consider that fact. (R.62, Perry affidavit, ¶ 4). Therefore, if petitioner has standing, its success on the merits is more than probable.

3. The sole issue raised by the dismissal below, the proper application of the "zone of interests" criterion for standing to obtain judicial review under Article 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, is an important one in federal litigation which has not been, and should be, decided by this Court. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), when the "legal interest" test of standing was overruled on the ground that it was in fact a premature judgment on the merits, the majority held that, in addition to the constitutional case or controversy requirements, the question of a plaintiff's standing under 5 U.S.C. § 702 ". . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.* Exhaustive research has revealed no case in which this Court has denied a plaintiff standing on the basis of the "zone of interests" criterion. However, a definitive standard for application of that prudential limitation has never been set. On the contrary, this Court expressly declined to decide the meaning, scope and proper application of the criterion in *Sierra Club* v. *Morton*, 405 U.S. 727, 733 n.5 (1972), *United*

* The "zone of interests" criterion was used to find standing under 5 U.S.C. § 702 in *Barlow* v. *Collins*, 397 U.S. 159 (1970), *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). Although it was applied to uphold standing for a constitutional claim in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), it has not been applied by this Court in the case of a statutory violation since 1971.

States v. *SCRAP*, 412 U.S. 669, 686 n.13 (1973) and *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976). Moreover, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80-81 (1978) recognized that the prudential limitations on standing need not be independently applied in every case, stating:

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.

This Court's most recent statement regarding the current status of "zone of interests" criterion is only that it is ". . . to be applied in appropriate circumstances." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979).

4. The difficulty in applying the criterion has been commented upon by the First, Second, Third, Seventh, Tenth and District of Columbia Circuits,* and has led to criti-

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* *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 583 n.28 (3d Cir. 1979); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 138-39 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *R. I. Committee on Energy* v. *General Services Administration*, 561 F.2d 397, 402 (1st Cir. 1977); *Cotovsky-Kaplan Physical Therapy Assoc., Ltd.* v. *United States*, 507 F.2d 1363, 1365 (7th Cir. 1975); *Sneaker Circus, Inc.* v. *Carter*, 457 F.Supp. 771, 780 n.7 (E.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (2d Cir. 1979); *Hiatt Grain & Feed, Inc.* v. *Bergland*, 446 F.Supp. 457, 469 (D.Kan. 1978); *aff'd*, 602 F.2d 929 (10th Cir. 1979); *Colligan* v. *Activities Club of New York, Ltd.*, 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971). *See also Pacemaker Monitor Corp.* v. *United States*, 440 F.Supp. 473, 483-85 (S.D.Fla. 1977).

cism by several commentators.* Indeed, the difficulty has prompted the Third Circuit to limit its application of the criterion, and the Eighth Circuit has expressed its preference for a standing analysis in which the criterion is not considered.**

5. A conflict exists among the circuits with respect to the proper means of determining the relevant "zone of interests." The District of Columbia Circuit has decided, at least with respect to the Internal Revenue Code, that only the specific section of the statute allegedly violated should be examined,*** while most courts look to the statute as a whole,† or to other statutes which were intended

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* K. Davis, *Administrative Law Treatise* (Supp. 1980), § 22.02-11, at 175-78; K. Davis, *Standing, 1976*, 72 N.W.U.L. Rev. 69, 81 (1976); L. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 495-97 (1974); R. Sedler, *Standing, Justiciability, and All That: A Behavorial Analysis*, 25 Vand. L. Rev. 479, 484-87 (1972); K. Davis, *The Liberalized Law of Standing*, 37 U.Chi. L. Rev. 450 (1970).

** *Local 2855, AFGE (AFL-CIO)* v. *United States, supra*, 602 F.2d at 582-83 n.28 (3d Cir. 1979); *Park View Heights Corporation* v. *City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972). *See also Merriam* v. *Kunzig*, 476 F.2d 1233, 1242 n.7 (3d Cir.), *cert. denied sub nom. Gateway Center Corp.* v. *Merriam*, 414 U.S. 911 (1973).

*** "[A]s a general rule, we believe that the particular statutory section [allegedly violated] should be the focus of analysis when applying the zone test." *Tax Analysts & Advocates* v. *Blumenthal, supra*, 566 F.2d at 141. Although this analysis also conflicts with this Court's reference to ". . . the statutory framework within which [a plaintiff's] claim arises . . .," *Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100 n.6; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1973), apparently it is the analysis which was employed by the district court in this action.

† *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 999 n.23 (D.C.Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 1274 (1980); *Port of Astoria, Or.* v. *Hodel*, 595 F.2d 467, 475 (9th Cir. 1979); *National State Bank of Elizabeth, N.J.* v. *Smith*, 591

by Congress to be construed in harmony with the one allegedly violated.* That conflict is exemplified in the proceedings below in this case.

6. The district court analyzed the "zone of interests" reflected in the citizenship requirement of Title XI, the violation of which is the basis of the illegality of MarAd's approval of National as a Title XI applicant and demise charterer. 46 U.S.C. §§ 1244(c), 1271(b), 1273(a)(1), 1274(a); 46 C.F.R. §§ 221.7(a), 298.10(a) (1979). It held that the citizenship requirement served only a purpose of national defense, and did not protect petitioner's asserted interest in remaining free of foreign competition in the coastwise trade. Petitioner respectfully submits that the district court not only erroneously applied the zone

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F.2d 223, 232 (3d Cir. 1979) and cases there cited; *R. I. Committee on Energy* v. *General Services Administration, supra,* 561 F.2d at 401 (1st Cir. 1977); *Robinson* v. *Knebel,* 550 F.2d 422, 424 (8th Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank,* 541 F.2d 759, 765 (8th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); *Clinton Community Hospital Corp.* v. *Southern Md. Medical Center,* 510 F.2d 1037, 1038 (4th Cir.), *cert. denied,* 422 U.S. 1048 (1975); *Ray Baille Trash Hauling, Inc.* v. *Kleppe,* 477 F.2d 696, 701 (5th Cir. 1973), *cert. denied,* 415 U.S. 914 (1974); *Colligan* v. *Activities Club of New York, Ltd., supra,* 442 F.2d at 691-92 (2d Cir.), *cert. denied,* 404 U.S. 1004 (1971); *Haitt Grain & Feed, Inc.* v. *Bergland, supra,* 446 F.Supp. at 469; *American Maritime Ass'n* v. *Blumenthal,* 458 F.Supp. 849, 856 (D.D.C. 1977), *aff'd,* 590 F.2d 1159 (D.C.Cir. 1978), *cert. denied,* 441 U.S. 943 (1979). *Compare, Simon* v. *Eastern Ky. Welfare Rights Org., supra,* 426 U.S. at 59 n.8.

* *See Armco Steel Co.* v. *Stans,* 303 F.Supp. 262, 268 (S.D.N.Y. 1969), *aff'd,* 431 F.2d 779, 784 (2d Cir. 1970). *Compare, Gladstone, Realtors* v. *Village of Bellwood, supra,* 441 U.S. at 100 n.6; *Simon* v. *Eastern Ky. Welfare Rights Org., supra,* 426 U.S. at 39 n.19. The court of appeals did not refer to its prior decision in *Armco* in its order in this case. It is not clear whether the court intended to overrule its standing holding in *Armco,* however, since it decided this case in a summary order, thereby prohibiting its citation in any unrelated matter. Local Rule § 0.23.

of interests criterion, but that its finding regarding the purpose of the citizenship requirement failed to follow this Court's holding in *Central Vt. Transportation Co.* v. *Durning, supra.* Although the court of appeals affirmed the lower court's denial of standing, its application of the "zone of interests" criterion bears no relationship to that of the district court. The court of appeals applied the zone of interests criterion by purporting to identify the interests protected or regulated by Tile XI as a whole, although it apparently considered the purposes and policies set forth in 46 U.S.C. §§ 861 and 1101 and the enacting clause of the 1938 Act, of which Title XI was a part, to be irrelevant to its analysis. Its finding that the Title XI program was intended only to facilitate private financing of ship construction, was based exclusively on a statement in a House Committee report with respect to a bill to amend certain procedural sections of Title XI,* none of which is in issue in this action. Exclusive reliance on such a Committee report to irrelevant amendments is apparently unprecedented in the application of the "zone of interests" analysis, and is unsupported by any standing holding of this Court.**

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* The court of appeals' conclusion, at pages 2-3 of its decision, that Title XI was intended only to facilitate private financing of ship construction, was based exclusively on a statement in H.R. Rep. No. 1042, 83d Cong., 1st Sess. at 1 (1953), that "[t]he purpose of the bill is to encourage the use of private capital in the financing of ship construction." That bill, H.R. 6441, became Pub. L. No. 288, 67 Stat. 626, 83d Cong., 1st Sess. (1953), and was purely amendatory to certain sections of Title XI, none of which are in issue in this action. Although the 1953 procedural amendments were intended to facilitate administration of the Title XI program, they are not indicative of the purpose of the program itself. *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co., supra,* 100 S.Ct. at 807-808.

** To the extent any statement in the House Committee report conflicts with the enacting clause of Pub. L. No. 75-705, *supra,* in which Title XI was enacted in 1938, the court of appeals' re-

7. This Court has long held that all the shipping regulation statutes, including the Merchant Marine Act of 1920, are intended to give effect to the United States' oldest policy, protecting its merchant marine from foreign competition in the domestic trade. *Central Vt. Transportation Co.* v. *Durning, supra,* 294 U.S. at 38-39. Most recently, this Court recognized that the financial assistance programs under the Merchant Marine Act of 1936, as amended, including the Title XI program, were intended to further that policy by providing financial assistance to United States citizens while denying it to their foreign competition. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co., supra,* 100 S.Ct. at 802-03, 808. Although the court of appeals cited the *Seatrain* decision, it is submitted that that decision not only fails to support the court of appeals' conclusion regarding the limited purpose of Title XI, but rather supports the position of petitioner. No respondent disputed below that petitioner's competitive interests are within the "zone" protected by the statutory provisions regulating the operation of the Dredge. 46 U.S.C. §§ 802, 861 and 883. Therefore, if those provisions of the Merchant Marine Act of 1920 are relevant to determination of the proper "zone of interests" in this case, petitioner's standing under the criterion is conclusively established.

8. Because the "zone of interests" criterion is the only bar to petitioner's standing to bring this action,* it is

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liance on the report demonstrates the wisdom of this Court's recognition that ". . . the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348-49 (1963); *United States* v. *Price,* 361 U.S. 304, 313 (1960).

* As discussed in the statement of facts, *supra,* the district court properly assumed the truth of petitioner's allegation of future economic and competitive injury, supported by an uncontroverted

submitted that this Court should grant this petition in order to resolve the evident conflict regarding the criterion in the decisions below, as well as that among the Circuits, and to decide the important issue of the proper role and application of the criterion for standing under 5 U.S.C. § 702.

9. Not only does the case at bar present an important standing issue, but the outcome of this case will affect the future of the American domestic dredging industry as a whole. The National application declares that it was prompted by the Rivers and Harbors Improvements Act of 1978, Pub. L. No. 95-269, 92 Stat. 218 (1978), (33 U.S.C. §§ 622, 624 (1976) (Supp. II 1978), which was intended to encourage investment by Americans in privately owned hopper dredges, by increasing the number of the Corps of Engineers' dredging projects required to be let to private bid. Sen. Rep. No. 95-722, 95th Cong., 1st Sess., at 2, reproduced at 1978 U.S. Code, Cong. and Admin. News at 652. At the time of its enactment, Congress was concerned

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affidavit, (R.3, Lemmerhirt affidavit), and found that the constitutional requirement of injury in fact was satisfied. That finding was not disturbed by the court of appeals. Because the private respondents have admitted a substantial likelihood that the relief sought herein would terminate their project, it is clear that petitioner's injury is redressable. (R.17, Brown affidavit, ¶ 17; R.18, Brunner affidavit, ¶¶ 6, 7; R.19, Waldorf affidavit, ¶ 8). It is also clear that the asserted competitive injury flows directly from the Title XI assistance sought to be enjoined, since the National application specified petitioner's vessel. Manhattan Island, as its principal competition, and the government respondents based their preliminary approval of the Title XI application on their finding that the Dredge would in fact successfully compete with petitioner. (R.1, Exhibit "1", National Application, at 23; R.16, private defendants' statement of uncontroverted facts, ¶ 1). Thus, the requirements of injury in fact, causally related to the challenged action and redressable by the relief sought are clearly present. Moreover, petitioner's success on the merits is more than probable. *See* ¶ 2, *supra*.

about ". . . the danger of foreign dredging taking over U.S. hopper dredge capability . . ." as a result of the program contemplated in the Act. *See Contract Dredging: Hearing on H.R. 7744 before the Subcomm. on Water Resources of the Senate Comm. on Environment and Public Works,* 95th Cong., 2d Sess., at 32-33, 52 (1978). It was given assurances by representatives of the American dredging industry, including Williams-McWilliams, as well as the Corps of Engineers, that the citizenship requirements of Title XI and related statutes, the violation of which have given rise to this action, limit foreign participation in American dredging firms to 25% and thus eliminate this danger. *Id.* Yet the dredge which is the subject of this action, the largest, most technologically advanced hopper dredge in the market, will be used solely by Stuyvesant, a non-citizen, for the benefit of Bos Kalis, also a non-citizen, primarily to perform contracts pursuant to the program fostered by the Rivers and Harbors Improvements Act, contrary to the assurances given Congress. If, by means of Title XI assistance, the largest foreign dredging firm obtains the benefits of the Corps program under the Rivers and Harbors Improvements Act, it is apparent that the goal of that Act will be thwarted, and, as Congress realized, American firms will be discouraged from making the substantial investments which the Act was intended to encourage.* Whether petitioner has standing to pursue the action at bar is, therefore, an issue, the outcome of which will significantly affect the future of the

* Certainly petitioner would not have invested, as it did, many millions of dollars, and obligated itself to the extent of nearly $27,000,000 under the Title XI program, for new hopper dredges in order to participate in the Rivers and Harbors Improvements Act program without the protection from foreign competition afforded by Title XI and related statutes. 46 U.S.C. §§ 802, 861, 883, 1101, 1244(c), 1271(b), 1273(a) and 1274(a).

Corps of Engineers dredging program and the entire American dredging industry.

10. Absent judicial review of the decision below, the purpose of the review provisions of the Administrative Procedure Act will be frustrated. As this Court noted in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 n.2 (1967), "[t]o preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it." *See American Fed'n of Gov't Employees, Local 1858* v. *Callaway*, 398 F.Supp. 176, 187 (N.D. Ala. 1975). And "a primary purpose of judicial review of administrative action is to insure the integrity of the decision making process," *Williams* v. *Robinson*, 432 F.2d 637, 642 (D.C. Cir. 1970), as well as to "check illegal and arbitrary administrative action." *DiCostanzo* v. *Willard*, 165 F.Supp. 533, 538 (E.D.N.Y. 1958). In short, "[t]he courts stand between the citizen and administrative officers." *American President Lines* v. *Federal Maritime Board*, 112 F.Supp. 346, 349 (D.D.C. 1953). At bar, however, if petitioner is denied standing despite the lack of any clear indication of intent to preclude reviewability, the effect will be to insulate the actions of MarAd from any judicial scrutiny. It is no answer to say, as did the district court here, after assuming a violation of the citizenship provision by MarAd, (R.44, at 6), that it "is the Attorney General's responsibility to see that it is cleared up," (*id.*, at 7), for it is the Department of Justice which is defending the legality of the agency's acts in this instance. Thus, petitioner will be denied the protection of judicial review of agency action, the integrity of which it has attacked, and which will cause it great economic harm.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX

Appendix "A"

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June, one thousand nine hundred and eighty.

UNITED STATES COURT OF APPPEALS
SECOND CIRCUIT
FILED JUN 16 1980
A. Daniel Fusaro, Clerk

Present:

HON. THOMAS J. MESKILL,
HON. JAMES L. OAKES,
Circuit Judges.

HON. DUDLEY B. BONSAL,
District Judge.

80-6053

GREAT LAKES INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellees.

Appendix "A"

ORDER

Great Lakes International, Inc. ("Great Lakes") instituted this action on December 19, 1979 against the Maritime Administration and various private defendants. Great Lakes seeks review of a conditional commitment by the Maritime Administration to issue a federal guarantee in aid of the construction of a suction hopper dredge by the private defendants. By order dated March 12, 1980, the district court granted summary judgment dismissing the complaint on the ground that Great Lakes lacked standing. We affirm.

On March 2, 1979, National Dredging, Inc. applied to the Maritime Administration pursuant to Title XI of the Merchant Marine Act of 1936, 46 U.S.C. § 1271, *et seq.* ("Title XI"), for a federal guarantee in aid of the construction of a suction hopper dredge. By letter dated November 5, 1979, the Maritime Administration issued a conditional commitment covering a federal guarantee with respect to the suction hopper dredge. (The applicant was United States Trust Company of New York, which had been substituted for National Dredging, Inc.)

Great Lakes, through its subsidiaries, has received approximately $26,800,000 in Title XI guarantees in aid of the construction or purchase of three vessels, including two suction hopper dredges. Great Lakes is currently the only United States company operating suction hopper dredges.

In challenging the guarantee with respect to the suction hopper dredge, Great Lakes alleges that National Dredging, Inc. does not meet the citizenship requirement for receiving Title XI assistance and charges that the guarantee will "undercut plaintiff's position in the domestic dredging industry and result in loss of business to plaintiff with consequent great economic harm to it."

Appendix "A"

By order dated March 12, 1980, the United States District Court for the Southern District of New York, Whitman Knapp, Judge, granted defendants' cross motion for summary judgment and dismissed the complaint on the ground that Great Lakes lacked standing.

To have standing, a plaintiff must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). *Accord, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979).

The House report on Title XI states that "[t]he purpose of the bill is to encourage the use of private capital in the financing of ship construction." H.R. Rep. No. 1042, 83d Cong., 1st Sess. 2433 (1953). *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 100 S. Ct. 800, 807-808 (1980). Great Lakes' interest in restricting competition is not an interest covered by Title XI. Great Lakes therefore has no standing to bring this action.

The order of the district court is affirmed with costs.

/s/ James L. Oakes,
/s/ Thomas J. Meskill,
Circuit Judges.

/s/ Dudley B. Bonsal,
District Judge.

Appendix "B"

79 Civ. 6869

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GREAT LAKES INTERNATIONAL, INC.,

Plaintiff,

—v—

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,

Defendants.

New York, New York
March 12, 1980

Before:

HON. WHITMAN KNAPP,

District Judge.

APPEARANCES:

STANLEY J. NORTON
DANIEL J. DONOHUE
ROY G. BOWMAN
HOPEWELL H. DARNEILLE III
JOSEPH N. RENDINI
ALAN J. HRUSKA
THOMAS J. SWEENEY
STANLEY SHER
TWILA L. PERRY
ALLAN R. FREEDMAN

(Case called.)

Appendix "B"

The Court: This is a motion for summary judgment on various grounds. I had the good fortune to have a jury case settled and so, I spent yesterday and part of the day before going through the voluminous, and I may say expert, papers in this case.

I have come to the reasonably settled conclusion that the plaintiff has no standing and I think what I will do is put on the record my general feelings for those conclusions and let the plaintiff try to argue me out of it and, if he fails, that will be the judgment of the Court and that will put everybody in a position to get up to the 17th Floor, which ought to be a very simple case because I am not passing on any other question. And if the Court of Appeals decides I am wrong, then we will be back together again and then I will pass on the other questions.

I may say that now you won't find me as ignorant as you did the last time you were here.

For the purpose of my present thinking, I assume the truth of all the allegations in the plaintiff's complaint and I also assume injury-in-fact, i.e., if Congress had intended to create a monopoly, the simple allegation by a protected monopolist that someone was about to compete would carry with it a presumption of injury, and where arguing a preliminary injuncion motion, then it might be relevant to determine how immediate that injury was, but on the summary judgment motion, it would seem to me if Congress had intended that this plaintiff be protected from competition, the mere assertion that competition was about to occur would be sufficient to establish the threat of injury.

So, the whole "standing" question seems to me to boil down to whether the plaintiff is within the zone of interest, as the Courts have defined it. As to that, it seems to me clear that there is no evidence that Congress, in enacting

Title XI, intended to protect anyone from competition or to create any monopolies.

In this respect, the situation is entirely different from the one presented by Title V, which was at issue in this recent Supreme Court case, Seatrain Shipbuilding Corporation et al versus Shell Oil Company, et al, No. 78-1651, decided February 20, 1980.

In that case, standing was not contested; it was assumed, But in Title V, which was involved in that case, the Congress, in authorizing the subsidies for ships to be used in foreign commerce, was acutely aware of the injustice that would result if those subsidized ships were allowed to compete with the unsubsidized domestic, i.e., coastal, fleet. Consequently, these unsubsidized shipowners were clearly within the "zone of interest" and had standing to challenge any deviation from the congressional purpose.

The objective of Title XI, however, is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards. The citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war. To the extent that such requirements have not been complied with, and for the purpose of this "standing" discussion we have to assume that they were not complied with, the entire country is the loser and plaintiff is no differently situated than any other citizen.

There is no suggestion in Title XI that Congress intended to give one subsidized shipowner, such as plaintiff, any voice in deciding what its competition should be.

To go back to the Shell Oil case, if say, some other subsidized shipowner was complaining about favors being done

to the petitioner in that case, in my view, such other shipowners would clearly not have had standing.

That is my tentative conclusion and I will hear any criticism you may have of it. Maybe you will persuade me I am wrong.

Mr. Norton: First of all, the plaintiff's contention is not that it doesn't want competition but—

The Court: It doesn't want competition from this fellow.

Mr. Norton: It doesn't want an illegal competitor to be competing with it.

The Court: It doesn't want competition from this fellow.

Mr. Norton: That's right.

Now, you talk about the purpose of the Act, 1101; you say it doesn't apply to Title XI, but I think your Honor might have missed the fact that in 1271, which is in Title XI, it brings in dredging into the whole Title XI procedure and benefits of Title XI by 1271—

The Court: What section? Just a minute.

Mr. Norton: 1271(a), I believe, your Honor.

The Court: "The term 'mortgage' includes a preferred mortgage?" Is that what you are referring to?

Mr. Norton: Referring to the fact that dredging is included as part of Title XI and the purpose of Title XI is to be certain that any guarantees by MARAD must only be given to a citizen as defined in 46 US Code—

The Court: That's perfectly clear. I am assuming that MARAD violated that provision. I am merely saying you do not have standing.

Mr. Norton: I understood that.

I am saying that we are entitled to compete with American companies and, incidentally, the government in its affidavit—rather in its brief, says, and I will try to find it here—at page 13 of that brief, I quote:

Appendix "B"

"Indeed, it is clear that in the future, the Maritime Administration will approve applications for Title XI guarantees for other companies newly seeking to enter into the dredging business. Plaintiff will have to compete with other companies, regardless of the outcome of this case."

We say, fine; that's just what we are asking for. What MARAD has done and what the applicant, National Dredging Company, has done, they have come in here acting, pretty clearly to me, acting for a foreign dredging company which cannot—

The Court: I am assuming for the purpose of this argument that what MARAD did might very well get them all impeached, but all that I am saying is that you are not within the zone of interest and you can't sue them.

Mr. Norton: I say under 1271 I am, your Honor. Title 46—

The Court: All right. Well, I considered that argument and, as Mr. Justice Stone once said about my superiors up on the 17th Floor, they are often in error but never in doubt—and that is where I find myself: Maybe I am in error; I am not in doubt.

Mr. Norton: I would point out, your Honor, that when 1101 was added in 1936, the Act which included it was entitled "To Amend the Merchant Marine Act, 1936; to further promote the merchant marine policy therein declared, and for other purposes.

So that it is clear that under the unified single purpose declared in 1101(c), the government has a question of whether we are arguably within the zone of protection.

The Court: Well, I don't think you are any different any any (sic) other citizen. If these people are violating the law, all the citizens of the United States are suffering from

it and that is the Attorney General's responsibility to see that it is cleared up, not mine.

Mr. Norton: I think I have said it all, your Honor. I have said it in the papers and there is no point in repeating myself. It's like flogging a dead horse.

The Court: Well, all I can say is that I hope you don't convince the Court of Appeals that you are right, because to be quite frank, I don't want this back here.

Mr. Norton: We have different wishes in that regard. Could we have a stay, though, pending the appeal?

The Court: Well, I think—it seems to me you ought to have some sort of a stay, but I will hear the other side on the question. It seems to me you have told me that up to April 1st you are not hurting and that will give the Court of Appeals plenty of time to make a stay or not.

Mr. Hruska: Exactly, your Honor. I have no objection to a stay pending an application for a stay but I would oppose anything beyond that, because that might get us into the timing problem.

The Court: Well, my thought was to make a stay pending application for a stay until April 1. I give that much time because the Court of Appeals' Clerk's office likes not to have pressure if there is no need for pressure.

Mr. Hruska: Your Honor, could we have excepted from that stay our ability to submit papers to MARAD?

The Court: Yes. I see no reason why it should not be excepted from that stay, the ability to submit any papers to MARAD that you want to, on the understanding that MARAD will not act on those papers until April 1st so the stay shall sort of have been lifted.

Mr. Hruska: Could we have a limited exception to that matter of acting in the sense that we would like to have MARAD permitted to act on this question that newly

arose last night thaat I reported to your Honor's clerk this morning, and reported to Mr. Norton?

The Court: Put it on the record.

Mr. Hruska: That is the matter of the citizenship of the United States Corporation Company of Delaware.

The Court: Well, MARAD can do anything it wants to, except take final action on the application. That would seem to be satisfactory.

Mr. Hruska: That's fine.

The Court: They want to tidy up their act in any way they may. As long as they don't take final action.

Mr. Norton: Your Honor, may it also be directed that if they change any of the others or change other papers other the one to which he eludes, that we be notified of that?

The Court: I assume they will do that in due course.

Mr. Norton: I don't know whether they are going to submit a whole new setup.

Mr. Hruska: It's certainly not contemplated right now to submit a whole new setup.

The Court: I don't want to get into the business of regulating the MARAD procedures. All I am doing is saying that MARAD should take no final action up to and including April 1st, unless the stay is lifted by the Court of Appeals.

What notice MARAD requires everybody to give everybody else is MARAD's business, not mine.

I will endorse the motion papers that the motion for summary judgment is granted for the reasons stated on the record in open court and that will be filed within twenty minutes and you can start the procedures working.

(Matter concluded.)

Appendix "C"

RIVERS AND HARBORS IMPROVEMENTS ACT OF 1978

33 U.S.C. § 622. Contracts, etc., for implementation of projects for improvements and for dredging and related work by private industry; performance of work by federally owned fleet and transition to use of private industry; requirements, standards, and study relating to transition and accompanying reduction of federally owned fleet

(a) The Secretary of the Army, acting through the Chief of Engineers (hereinafter referred to as the "Secretary"), in carrying out projects for improvement of rivers and harbors (other than surveys, estimates, and gagings) shall, by contract or otherwise, carry out such work in the manner most economical and advantageous to the United States. The Secretary shall have dredging and related work done by contract if he determines private industry has the capability to do such work and it can be done at reasonable prices and in a timely manner. During the four-year period which begins on April 26, 1978, the Secretary may limit the application of the second sentence of this subsection for work for which the federally owned fleet is available to achieve an orderly transition to full implementation of this subsection.

(b) As private industry reasonably demonstrates its capability under subsection (a) of this section to perform the work done by the federally owned fleet, at reasonable prices and in a timely manner, the federally owned fleet shall be reduced in an orderly manner, as determined by the Secretary, by retirement of plant. To carry out emergency and national defense work the Secretary shall retain

only the minimum federally owned fleet capable of performing such work and he may exempt from the provisions of this section such amount of work as he determines to be reasonably necessary to keep such fleet fully operational, as determined by the Secretary, after the minimum fleet requirements have been determined. Notwithstanding the preceding sentence, in carrying out the reduction of the federally owned fleet, the Secretary may retain so much of the federally owned fleet as he determines necessary, for so long as he determines necessary, to insure the capability of the Federal Government and private industry together to carry out projects for improvements of rivers and harbors. For the purpose of making the determination required by the preceding sentence the Secretary shall not exempt any work from the requirements of this section. The minimum federally owned fleet shall be maintained to technologically modern and efficient standards, including replacement as necessary. The Secretary is authorized and directed to undertake a study to determine the minimum federally owned fleet required to perform emergency and national defense work. The study, which shall be submitted to Congress within two years after April 26, 1978, shall also include preservation of employee rights of persons presently employed on the existing federally owned fleet.

33 U.S.C. § 624. Limitation on improvement work by private contract—Determinations respecting comparison of private contract price with estimation of cost of performance or work by Government plant or by well-equipped contractor

(a) No works of river and harbor improvement shall be done by private contract—

(1) if the Secretary of the Army, acting through the Chief of Engineers, determines that Government plant is reasonably available to perform the subject work and the contract price for doing the work is more than 25 per centum in excess of the estimated comparable cost of doing the work by Government plant; or

(2) in any other circumstances where the Secretary of the Army, acting through the Chief of Engineers, determines that the contract price is more than 25 per centum in excess of what he determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work.

CONSIDERATIONS INVOLVED IN DETERMINATIONS OF ESTIMATION OF COST OF PERFORMANCE OF WORK BY GOVERNMENT PLANT

(b) In estimating the comparable cost of doing the work under subsection (a)(1) of this section by Government plant the Secretary of the Army, acting through the Chief of Engineers shall, in addition to the cost of labor and materials, take into account proper charges for depreciation of plant, all supervising and overhead expenses, interest on the capital invested in the Government plant (but the rate of interest shall not exceed the maximum prevailing rate being paid by the United States on current issues of bonds or other evidences of indebtedness) and such other Government expenses and charges as the Chief of Engineers determines to be appropriate.

CONSIDERATIONS INVOLVED IN DETERMINATIONS OF ESTIMATION OF COST OF PERFORMANCE OF WORK BY WELL-EQUIPPED CONTRACTOR

(c) In determining a fair and reasonable estimated cost of doing work by private contract under subsection (a)(2)

of this section, the Secretary of the Army, acting through the Chief of Engineers, shall, in addition to the cost of labor and materials, take into account proper charges for depreciation of plant, all expenses for supervision, overhead, workmen's compensation, general liability insurance, taxes (State and local), interest on capital invested in plant, and such other expenses and charges the Secretary of the Army, acting through the Chief of Engineers, determines to be appropriate.

46 U.S.C. § 802. Corporation, partnership or association as citizen

(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or

(b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

46 U.S.C. § 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade

Any vessel purchased, chartered, or leased from the Secretary of Commerce, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of

the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the Secretary to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

Every vessel purchased, chartered, or leased from the Secretary shall, unless otherwise authorized by the Secretary, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the Secretary of Commerce, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

* * *

Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or

operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both.

46 U.S.C. § 861. Purpose and policy of United States

It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a Merchant Marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this act, the Federal Maritime Commission and the Secretary of Commerce shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

46 U.S.C. § 883. Transportation of merchandise between points in other than domestic-built or rebuilt and documented vessels

No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise

(or a monetary amount up to the value thereof as determined by the Secretary of the Treasury to be recovered from any consignor, seller, owner, importer, consignee, agent or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: *Provided,* That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwide trade; . . . .

• • •

46 U.S.C. § 1101. Fostering development and maintenance of merchant marine

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of

serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

MERCHANT MARINE ACT OF 1938
AN ACT

To amend the Merchant Marine Act, 1936, to further promote the merchant marine policy therein declared, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 202 of the Merchant Marine Act, 1936, is amended by adding at the end thereof a new sentence to read as follows: "The Commission may, upon such terms and conditions as it may prescribe in accordance with sound business practice, make such extensions and accept such renewals of the notes and other evidences of indebtedness hereby transferred, and of the mortgages and other contracts securing the same, as it may deem necessary to carry out the objects of this Act."

* * *

§ 1, Pub. L. No. 75-705, 52 Stat. 953-54 (1938)

Appendix "C"

46 U.S.C. § 1244. Definitions

When used in this chapter—

* * *

(c) The words "citizen of the United States" include a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 802 of this title, and with respect to a corporation under subchapter VI of this chapter, all directors of the corporation are citizens of the United States, and, in the case of a corporation, partnership, or association operating a vessel on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States the amount of interest required to be owned by a citizen of the United States shall be not less than 75 per centum.

* * *

TITLE XI OF THE MERCHANT MARINE ACT OF 1936, AS AMENDED

46 U.S.C. § 1271. Definitions

As used in this subchapter—

(a) The term "mortage" includes a preferred mortgage as defined in the Ship Mortgage Act, 1920, as amended, on any vessel of the United States (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel of less than twenty-five gross tons), and a mortgage on such a vessel which will become a preferred mortgage when recorded and endorsed as required by the Ship Mortgage Act, 1920, as amended;

(b) The term "vessel" includes all types, whether in existence or under construction, of passenger cargo and combination passenger-cargo carrying vessels, tankers,

tugs, tow-boats, barges and dredges which are or will be documented under the laws of the United States, fishing vessels whose ownership will meet the citizenship requirements for documenting vessels in the coastwide trade within the meaning of section 802 of this title, floating drydocks which have a capacity of thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treatment, abatement or control vessels owned by citizens of the United States;

(c) The term "obligation" shall mean any note, bond, debenture, or other evidence of indebtedness (exclusive of notes or other obligations issued by the Secretary of Commerce pursuant to section 1275(d) of this title and obligations eligible for investment of funds under sections 1272 and 1279a(d) of this title), issued for one of the purposes specified in section 1274(a) of this title;

(d) The term "obligor" shall mean any party primarily liable for payment of the principal of or interest on any obligation;

(e) The term "obligee" shall mean the holder of an obligation;

(f) The term "actual cost" of a vessel as of any specified date means the aggregate, as determined by the Secretary of Commerce, of (i) all amounts paid by or for the account of the obligor on or before that date, and (ii) all amounts which the obligor is then obligated to pay from time to time thereafter, for the construction, reconstruction, or reconditioning of such vessel;

(g) The term "depreciated actual cost" of a vessel means the actual cost of the vessel depreciated on a straightline

basis over the useful life of the vessel as determined by the Secretary of Commerce, not to exceed twenty-five years from the date the vessel was delivered by the shipbuilder, or, if the vessel has been reconstructed or reconditioned, the actual cost of the vessel depreciated on a straightline basis from the date the vessel was delivered by the shipbuilder to the date of such reconstruction or reconditioning on the basis of the original useful life of the vessel and from the date of such reconstruction or reconditioning on a straightline basis and on the basis of a useful life of the vessel determined by the Secretary of Commerce, plus all amounts paid or obligated to be paid for the reconstruction or reconditioning depreciated on a straightline basis and on the basis of a useful life of the vessel determined by the Secretary of Commerce; and

(h) The terms "construction", "reconstruction", or "reconditioning" shall include, but shall not be limited to, designing, inspecting, outfitting and equipping.

46 U.S.C. § 1272. Federal Ship Financing Fund

There is created a Federal Ship Financing Fund (hereinafter referred to as the Fund) which shall be used by the Secretary of Commerce as a revolving fund for the purpose of carrying out the provisions of this subchapter, and there shall be allocated to such Fund the sum of $1,000,000 out of funds made available to the Secretary of Commerce under the appropriation authorized by section 1279 of this title. Moneys in the Fund shall be deposited in the Treasury of the United States to the credit of the Fund or invested in bonds or other obligations of, or guaranteed as to principal and interest by, the United States.

Appendix "C"

46 U.S.C. § 1273. Authorization of Secretary to guarantee obligations

PRINCIPAL AND INTEREST

(a) The Secretary of Commerce, upon application by a citizen of the United States, is authorized to guarantee, and to enter into commitments to guarantee, the payment of the interest on, and the unpaid balance of the principal of, any obligation which is eligible to be guaranteed under this subchapter.

SECURITY INTEREST

(b) No obligation shall be guaranteed under this subchapter unless the obligor conveys or agrees to convey to the Secretary of Commerce such security interest, which may include a mortgage or mortgages on a vessel or vessels, as the Secretary of Commerce may reasonably require to protect the interests of the United States.

AMOUNT OF GUARANTEE; PERCENTAGE LIMITATIONS; DETERMINATION OF ACTUAL COST OF VESSEL

(c) The Secretary of Commerce shall not guarantee the principal of obligations in an amount in excess of 75 per centum, or 87½ per centum, whichever is applicable under section 1274 of this title, of the amount, as determined by the Secretary of Commerce which determination shall be conclusive, paid by or for the account of the obligor for the construction, reconstruction, or reconditioning of a vessel or vessels with respect to which a security interest has been conveyed to the Secretary of Commerce, unless the obligor creates an escrow fund as authorized by section 1279a of this title, in which case the Secretary of Commerce may guarantee 75 per centum or 87½ per centum, whichever is

applicable under section 1274 of this title, of the actual cost of such vessel or vessels.

PLEDGE OF UNITED STATES

(d) The full faith and credit of the United States is pledged to the payment of all guarantees made under this subchapter with respect to both principal and interest, including interest, as may be provided for in the guarantee, accruing between the date of default under a guaranteed obligation and the payment in full of the guarantee.

PROOF OF OBLIGATIONS

(e) Any guarantee, or commitment to guarantee, made by the Secretary of Commerce under this subchapter shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee, or commitment to guarantee, so made shall be incontestable.

LIMITATION ON OUTSTANDING AMOUNT

(f) The aggregate unpaid principal amount of the obligations guaranteed under this section and outstanding at any one time shall not exceed $10,000,000,000.

46 U.S.C. § 1274. Eligibility for guarantee

PURPOSE OF OBLIGATIONS

(a) Pursuant to the authority granted under section 1273(a) of this title, the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest of an obligation which aids in—

(1) financing, including reimbursement of an obligor for expenditures previously made for, construction, re-

construction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use (A) in the coastwise or intercoastal trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; (C) in foreign trade as defined in section 1244 of this title for purposes of subchapter V of this chapter; (D) in the fishing trade or industry; or (E) with respect to floating drydocks, in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1275 of this title and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to subchapter V of this chapter; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this subchapter, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

Appendix "C"

CONTENTS OF OBLIGATIONS

(b) Obligations guaranteed under this subchapter—

(1) shall have an obligor approved by the Secretary of Commerce as responsible and possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel or vessels which serve as security for the guarantee of the Secretary of Commerce;

(2) subject to the provisions of paragraph (1) of subsection (c) of this section, shall be in an aggregate principal amount which does not exceed 75 per centum of the actual cost or depreciated actual cost, as determined by the Secretary of Commerce, of the vessel which is used as security for the guarantee of the Secretary of Commerce: *Provided, however,* That in the case of a vessel, the size and speed of which are approved by the Secretary of Commerce, and which is or would have been eligible for mortgage aid for construction under section 1159 of this title (or would have been eligible for mortgage aid under section 1159 of this title except that the vessel was built with the aid of construction-differential subsidy and said subsidy has been repaid) and in respect of which the minimum down-payment by the mortgagor required by that section would be or would have been 12½ per centum of the cost of such vessel, such obligations may be in an amount which does not exceed 87½ per centum of such actual cost or depreciated actual cost: *Provided, further,* That the obligations which relate to a barge which is constructed without the aid of construction-differential subsidy, or, if so subsidized on which said subsidy has been repaid, may be in an aggregate principal

amount which does not exceed 87½ per centum of the actual cost or depreciated actual cost thereof: *Provided, further,* That in the case of any vessel to be used in the fishing trade or industry, such obligations may be in an aggregate principal amount which does not exceed 87½ per centum of the actual cost or depreciated actual cost of the vessel;

(3) shall have maturity dates satisfactory to the Secretary of Commerce but, subject to the provisions of paragraph (2) of subsection (c) of this section, not to exceed twenty-five years from the date of the delivery of the vessel which serves as security for the guarantee of the Secretary of Commerce or, if the vessel has been reconstructed or reconditioned, not to exceed the later of (i) twenty-five years from the date of delivery of the vessel and (ii) the remaining years of the useful life of the vessel as determined by the Secretary of Commerce;

(4) shall provide for payments by the obligor satisfactory to the Secretary of Commerce;

(5) shall bear interest (exclusive of charges for the guarantee and service charges, if any) at rates not to exceed such per centum per annum on the unpaid principal as the Secretary of Commerce determines to be reasonable, taking into account the range of interest rates prevailing in the private market for similar loans and the risks assumed by the Secretary of Commerce;

(6) shall provide, or a related agreement shall provide, that if the vessel used as security for the guarantee of the Secretary of Commerce is a delivered vessel, the vessel shall be in class A-1, American Bureau of

Shipping, or shall meet such other standards as may be acceptable to the Secretary of Commerce, with all required certificates, including but no limited to, marine inspection certificates of the United States Coast Guard, with all outstanding requirements and recommendations necessary for retention of class accomplished, unless the Secretary of Commerce permits a deferment of such repairs, and shall be tight, stanch, strong, and well and sufficiently tackled, appareled, furnished, and equipped, and in every respect seaworthy and in good running condition and repair, and in all respects fit for service; and

(7) may provide, or a related agreement may provide, if the vessel used as security for the guarantee of the Secretary of Commerce is a passenger vessel having the tonnage, speed, passenger accommodations and other characteristics set forth in subchapter V of this chapter, and if the Secretary of Commerce approves, that the sole recourse against the obligor by the United States for any payments under the guarantee shall be limited to repossession of the vessel and the assignment of insurance claims and that the liability of the obligor for any payments of principal and interest under the guarantee shall be satisfied and discharged by the surrender of the vessel and all right, title, and interest therein to the United States: *Provided*, That the vessel upon surrender shall be (i) free and clear of all liens and encumbrances whatsoever except the security interest conveyed to the Secretary of Commerce under this subchapter, (ii) in class, and (iii) in as good order and condition, ordinary wear and tear excepted, as when acquired by the obligor, except that any defi-

ciencies with respect to freedom from encumbrances, condition and class may, to the extent covered by valid policies of insurance, be satisfied by the assignment to the Secretary of Commerce of claims of the obligor under such policies.

SECURITY

(c)(1) The security for the guarantee of an obligation by the Secretary of Commerce under this subchapter may relate to more than one vessel and may consist of any combination of types of security. The aggregate principal amount of obligations which have more than one vessel as security for the guarantee of the Secretary of Commerce under this subchapter may equal, but not exceed, the sum of the principal amount of obligations permissible with respect to each vessel.

(2) If the security for the guarantee of an obligation by the Secretary of Commerce under this subchapter relates to more than one vessel, such obligation may have the latest maturity date permissible under subsection (b) of this section with respect to any of such vessels: *Provided,* That the Secretary of Commerce may require such payments of principal, prior to maturity, with respect to all related obligations as he deems necessary in order to maintain adequate security for his guarantee.

RESTRICTIONS

(d) No commitment to guarantee an obligation shall be made by the Secretary of Commerce unless he finds, at or prior to the time such commitment is made, that the property or project with respect to which the obligation will be executed will be, in his opinion, economically sound

and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources, and no obligation, unless made pursuant to a prior commitment, shall be guaranteed unless the Secretary of Commerce finds, at or prior to the time the guarantee becomes effective, that the property or project with respect to which the obligation is executed will be, in his opinion, economically sound and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources.

GUARANTEE FEES

(e) The Secretary of Commerce is authorized to fix a fee for the guarantee of an obligation under this subchapter. If the security for the guarantee of an obligation under this subchapter relates to a delivered vessel, such fee shall not be less than one-half of 1 per centum per annum nor more than 1 per centum per annum of the average principal amount of such obligation outstanding, excluding the average amount (except interest) on deposit in an escrow fund created under section 1279a of this title. If the security for the guarantee of an obligation under this subchapter relates to a vessel to be constructed, reconstructed, or reconditioned, such fee shall not be less than one-quarter of 1 per centum per annum nor more than one-half of 1 per centum per annum of the average principal amount of such obligation outstanding, excluding the average amount (except interest) on deposit in an

escrow fund created under section 1279a of this title. For purposes of this subsection (e), if the security for the guarantee of an obligation under this subchapter relates both to a delivered vessel or vessels and to a vessel or vessels to be constructed, reconstructed, or reconditioned, the principal amount of such obligation shall be prorated in accordance with the regulations prescribed by the Secretary of Commerce. Fee payments shall be made by the obligor to the Secretary of Commerce when moneys are first advanced under a guaranteed obligation and at least sixty days prior to each anniversary date thereafter. All fees shall be computed and shall be payable to the Secretary of Commerce under such regulations as the Secretary of Commerce may prescribe.

INVESTIGATION OF APPLICATIONS

(f) The Secretary of Commerce shall charge and collect from the obligor such amounts as he may deem reasonable for the investigation of applications for a guarantee, for the appraisal of properties offered as security for a guarantee, for the issuance of commitments, for services in connection with the escrow fund authorized by section 1279a of this title and for the inspection of such properties during construction, reconstruction, or reconditioning: *Provided,* That such charges shall not aggregate more than one-half of 1 per centum of the original principal amount of the obligations to be guaranteed.

DISPOSITION OF MONEYS

(g) All moneys received by the Secretary of Commerce under the provisions of sections 1271 to 1276 and 1279 of this title shall be deposited in the Fund.

Appendix "C"

ADDITIONAL REQUIREMENTS

(h) Obligations guaranteed under this subchapter and agreements relating thereto shall contain such other provisions with respect to the protection of the security interests of the United States (including acceleration and subrogation provisions and the issuance of notes by the obligor to the Secretary of Commerce), liens and releases of liens, payments of taxes, and such other matters as the Secretary of Commerce may, in his discretion, prescribe.

46 U.S.C. § 1275. Defaults

RIGHTS OF OBLIGEE

(a) In the event of a default, which has continued for thirty days, in any payment by the obligor of principal or interest due under an obligation guaranteed under this subchapter, the obligee or his agent shall have the right to demand, at or before the expiration of such period as may be specified in the guarantee or related agreements, but not later than ninety days from the date of such default, payment by the Secretary of Commerce of the unpaid principal amount of said obligation and of the unpaid interest thereon to the date of payment. Within such period as may be specified in the guarantee or related agreements, but not later than thirty days from the date of such demand, the Secretary of Commerce shall promptly pay to the obligee or his agent the unpaid principal amount of said obligation and unpaid interest thereon to the date of payment: *Provided,* That the Secretary of Commerce shall not be required to make such payment if prior to the expiration of said period he shall find that there was no default by the obligor in the payment of principal or

interest or that such default has been remedied prior to any such demand.

NOTICE OF DEFAULT

(b) In the event of a default under a mortgage, loan agreement, or other security agreement between the obligor and the Secretary of Commerce, the Secretary of Commerce may notify the obligee or his agent of such default and the obligee or his agent shall have the right to demand at or before the expiration of such period as may be specified in the guarantee or related agreements, but not later than sixty days from the date of such notice, payment by the Secretary of Commerce of the unpaid principal amount of said obligation and of the unpaid interest thereon. Within such period as may be specified in the guarantee or related agreements, but not later than thirty days from the date of such demand, the Secretary of Commerce shall promptly pay to the obligee or his agent the unpaid principal amount of said obligation and unpaid interest thereon to the date of payment.

SECRETARY TO COMPLETE, SELL OR OPERATE PROPERTY

(c) In the event of any payment by the Secretary of Commerce under subsection (a) or (b) of this section, the Secretary of Commerce shall have all rights in any security held by him relating to his guarantee of such obligations as are conferred upon him under any security agreement with the obligor. Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of property by the United States, the Secretary of Commerce shall have the right, in his discretion, to complete, recondition, reconstruct, renovate, repair, maintain, operate, charter, or

sell any property acquired by him pursuant to a security agreement with the obligor or may place a vessel in the national defense reserve. The terms of the sale shall be as approved by the Secretary of Commerce.

CASH PAYMENTS; ISSUANCE OF NOTES OR OBLIGATIONS

(d) Any amount required to be paid by the Secretary of Commerce pursuant to subsection (a) or (b) of this section, shall be paid in cash. If at any time the moneys in the Fund authorized by section 1272 of this title are not sufficient to pay any amount the Secretary of Commerce is required to pay by subsection (a) or (b) of this section, the Secretary of Commerce is authorized to issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of Commerce, with the approval of the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of such notes or other obligations. The Secretary of the Treasury is authorized and directed to purchase any notes and other obligations to be issued hereunder and for such purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of such notes and obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this section. All

redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States. Funds borrowed under this section shall be deposited in the Fund and redemptions of such notes and obligations shall be made by the Secretary of Commerce from such Fund.

ACTIONS AGAINST OBLIGOR

(e) In the event of a default under any guaranteed obligation or any related agreement, the Secretary of Commerce shall take such action against the obligor or any other parties liable thereunder that, in his discretion, may be required to protect the interests of the United States. Any suit may be brought in the name of the United States or in the name of the obligee and the obligee shall make available to the United States all records and evidence necessary to prosecute any such suit. The Secretary of Commerce shall have the right, in his discretion, to accept a conveyance of title to and possession of property from the obligor or other parties liable to the Secretary of Commerce, and may purchase the property for an amount not greater than the unpaid principal amount of such obligation and interest thereon. In the event the Secretary of Commerce shall receive through the sale of property an amount of cash in excess of any payment made to an obligee under subsection (a) or (b) of this section and the expenses of collection of such amounts, he shall pay such excess to the obligor.

46 U.S.C. § 1276. Offenses and penalties

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that an obligation relating

to such loan or advance of credit shall be offered to or accepted by the Secretary of Commerce to be guaranteed, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage relating to an obligation guaranteed by the said Secretary of Commerce, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of said Secretary of Commerce under this subchapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income shall be guilty of a misdemeanor and punished as provided under the first paragraph of section 1228 of this title.

46 U.S.C. § 1279. Appropriations

There is authorized to be appropriated the sum of $1,000,000 and such further sums as may be necessary to carry out the provisions of this subchapter.

46 U.S.C. § 1279a. Escrow fund

CREATION

(a) If the proceeds of an obligation guaranteed under this subchapter are to be used to finance the construction, reconstruction, or reconditioning of a vessel or vessels which will serve as security for the guarantee of the Secre-

tary of Commerce, the Secretary of Commerce is authorized to accept and hold, in escrow under an escrow agreement with the obligor, a portion of the proceeds of all obligations guaranteed under this subchapter whose proceeds are to be so used which is equal to: (i) the excess of the principal amount of all obligations whose proceeds are to be so used over 75 per centum, or 87½ per centum, whichever is applicable under section 1274 of this title, of the amount paid by or for the account of the obligor for the construction, reconstruction, or reconditioning of the vessel or vessels; (ii) with such interest thereon, if any, as the Secretary of Commerce may require: *Provided,* That in the event the security for the guarantee of an obligation by the Secretary of Commerce relates both to a vessel or vessels to be constructed, reconstructed or reconditioned and to a delivered vesel or vessels, the principal amount of such obligation shall be prorated for purposes of this subsection (a) under regulations prescribed by the Secretary of Commerce.

DISBURSEMENT PRIOR TO TERMINATION OF ESCROW AGREEMENT

(b) The Secretary of Commerce shall, as specified in the escrow agreement, disburse the escrow fund to pay amounts the obligor is obligated to pay as interest on such obligations or for the construction, reconstruction, or reconditioning of the vessel or vessels used as security for the guarantee of the Secretary of Commerce under this subchapter, to redeem such obligations in connection with a refinancing under paragraph (4) of section 1274(a) of this title or to pay to the obligor at such times as may be provided for in the escrow agreement any excess interest deposits, except that if payments become due under the guarantee prior to the termination of the escrow agreement, all amounts in the escrow fund at the time such payments become due (including realized income which has not yet been paid to

the obligor) shall be paid into the Fund and (i) be credited against any amounts due or to become due to the Secretary of Commerce from the obligor with respect to the guaranteed obligations and (ii) to the extent not so required, be paid to the obligor.

DISBURSEMENT UPON TERMINATION OF ESCROW AGREEMENT

(c) If payments under the guarantee have not become due prior to the termination of the escrow agreement, any balance of the escrow fund at the time of such termination shall be disbursed to prepay the excess of the principal of all obligations whose proceeds are to be used to finance the construction, reconstruction, or reconditioning of the vessel or vessels which serve or will serve as security for such guarantee over 75 per centum or 87½ per centum, whichever is applicable under section 1274 of this title, of the actual cost of such vessel or vessels to the extent paid, and to pay interest on such prepaid amount of principal, and the remainder of such balance of the escrow fund shall be paid to the obligor.

INVESTMENT OF FUND

(d) The Secretary of Commerce may invest and reinvest all or any part of the escrow fund in obligations of the United States with such maturities that the escrow fund will be available as required for purposes of the escrow agreement.

PAYMENT OF INCOME

(e) Any income realized on the escrow fund shall, upon receipt, be paid to the obligor.

Appendix "C"

TERMS OF ESCROW AGREEMENT

(f) The escrow agreement shall contain such other terms as the Secretary of Commerce may consider necessary to protect fully the interests of the United States.

46 U.S.C. § 1279b. Rules and regulations

The Secretary of Commerce is authorized and directed to make such rules and regulations as may be deemed necessary or appropriate to carry out the purposes and provisions of this subchapter.

46 U.S.C. § 1280. Advances to fund

The Secretary of Commerce is authorized to advance to the Federal Ship Financing Fund from the "Vessel operations revolving fund", such amounts as may be required for the payment, pursuant to section 1275 of this title, of unpaid principal amounts of defaulted mortgages and loans and of unpaid interest thereon: *Provided,* That such advances shall be repaid to the "Vessel operations revolving fund" as soon as practicable consistent with the status of the Federal Ship Financing Fund: *Provided further,* That the total advances outstanding at any one time shall not exceed $10,000,000.

46 CFR § 221.7(a) (1979):

"The Department of Commerce, Maritime Administration, hereby approves . . . the charter of a person not a citizen of the United States of any vessel (including space in such vessel) documented under the laws of the United States. . . . Approval will not be granted to charters of the following nature:

(1) Demise or bareboat charters."

• • •

46 C.F.R. Part 298 (1979)—Obligation Guarantees

• • •

SUBPART A—INTRODUCTION

§ 298.1 Purpose.

This part prescribes regulations implementing the provisions of Title XI of the Merchant Marine Act, 1936, as amended by P.L. 92-507 (46 U.S.C. 1271-1279), governing Federal ship financing assistance.

• • •

§ 298.3 Applications.

(a) *Content and Amendment.* Each application for a commitment to execute Guarantees shall be made on Form MA 163 to the Secretary, Maritime Administration, United States Department of Commerce, Washington, D.C. 20230, and be certified in the manner prescribed on said form. All required information, including copies of any demise charters, time charters in excess of six months, contracts of affreightment, drilling contracts or other contractual arrangements with respect to the Vessel or Vessels, shall be presented on the form or in exhibits and schedules submitted with the application. Each exhibit and schedule shall contain a statement, on the first page thereof, clearly identifying the document as an attachment to an application for Obligation Guarantees, stating the name of the applicant and the date of the application. Any amendment of data contained in the application filed shall be marked "Amendment", and shall contain a statement on the first page thereof, clearly identifying the document as an amendment to

an application for Obligation Guarantees, stating the name of the applicant and the date of application. The certification required on Form MA 163 shall be affixed to each amendment. The Secretary will not process the application until the applicant has submitted substantially all required information.

* * *

SUBPART B—ELIGIBILITY

§ 298.10 Citizenship.

(a) *Applicability.* Prior to acquiring a legal or beneficial interest in a Vessel financed under Title XI of the Act, the applicant and any other Person (including, but not limited to settlors, owner trustees, owner participants, bareboat charterers and such charterers other than bareboat charterers whose charter exceeds the blanket approval period provided for in Part 221 of this Title 46), shall establish its United States citizenship, within the meaning of section 2 of the Shipping Act, 1916 (1916 Act), as amended (46 U.S.C. 801-852), sections 37 and 38 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 861-889), and, as applicable, section 905(c) of the Act, unless the Secretary approves a non-citizen participation under the authority of sections 9 and 41 and Section 37, as applicable, of the 1916 Act. The Secretary will not approve an application providing for ownership of such Vessel by, or bareboat chartering of such Vessel to, a non-U.S. citizen. See also Part 221 of this Title 46 concerning the documentation, transfer or charter of vessels to non-U.S. citizens. Citizenship may also be required of any Person who does not have a legal or beneficial ownership in the Vessel if such Person is the operator or has authority to direct the operation of the Vessel on behalf of the Shipowner.

Supreme Court, U. S.
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No. 80-366

IN THE

Supreme Court of the United States

October Term, 1980

GREAT LAKES INTERNATIONAL, INC.,
Petitioner,

—against—

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, *et al.*,
Respondents.

BRIEF FOR PRIVATE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether plaintiff's interest in foreclosing competition from a vessel whose construction may be assisted by a Government loan guarantee is arguably within the zone of interests to be protected by the statute in question (Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280)?

The district court and a unanimous panel of the court of appeals answered that question in the negative, held that plaintiff lacks standing to bring this suit, and granted defendants' motions for summary judgment dismissing the complaint.

For the reasons stated in this opposition brief, that decision was correct and does not warrant review by this Court. If, however, a writ of certiorari were to be granted, defendants would urge affirmance on the additional grounds of their motion that raise the following questions, none of which was reached on the merits by the courts below*:

2. Has plaintiff shown "specific facts" to establish a triable issue regarding the justiciability of the claim and plaintiff's standing to bring it, given:

(a) the numerous speculative contingencies that would have to eventuate during the next two years (many of which are under the control of non-parties, governmental and private) before the theorized threatened "injury in fact" could conceivably occur;

(b) the directive of 33 U.S.C. § 622 that the Federal dredger fleet be withdrawn from the market *pro tanto* with the entry of private dredgers such as that involved in this suit; and

---

* For the purpose of deciding that plaintiff failed to meet the zone test (question 1), the district court assumed *arguendo* that "injury in fact" could be established.

(c) the lack of any reasonable basis for predicting that the injunction plaintiff seeks will redress the putative loss that plaintiff theorizes?

3. Can plaintiff establish subject matter jurisdiction, given the provisions of 46 U.S.C. § 1273(e) that the challenged agency action is "conclusive" and "incontestable"?

4. Is plaintiff's claim that the Government defendants acted illegally or irrationally based on "specific facts" or on unsubstantiated, inherently implausible or otherwise impermissible speculation?

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No. 80-366

IN THE

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GREAT LAKES INTERNATIONAL, INC.,
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—against—

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, *et al.*,
Respondents.

BRIEF FOR PRIVATE RESPONDENTS IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280, and the Rivers and Harbors Improvements Act of 1978, 33 U.S.C. §§ 622, 624, both of which are set forth verbatim in the appendix to the petition for certiorari here opposed.

Also involved are the following regulations contained in 46 C.F.R. Part 298, the pertinent subdivisions of which are set forth verbatim in the appendix hereto: §§ 298.1, 298.2, 298.10, 298.11, 298.12, 298.14, 298.32, 298.43.

STATEMENT OF THE CASE

Plaintiff, Great Lakes International, Inc. ("Great Lakes"), petitions from the unanimous order of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, dismissing the complaint for lack of standing.

The suit is for an injunction to stop the Government from honoring its commitment to guarantee bonds pursuant to Title XI of the Merchant Marine Act of 1936 (46 U.S.C. §§ 1271-1280) in aid of the construction of a hopper dredger (a vessel used for the dredging of rivers and harbors).

Plaintiff is a stranger to that transaction but has itself received Title XI guarantees on $26.8 million of bonds for the construction of three dredgers. Two of those, which plaintiff owns in a joint venture with a Dutch company, are the only privately owned hopper dredgers currently operating in U.S. waters. 250a-51a.[1]

Plaintiff seeks to deprive the private defendants[2] of similar assistance. Its claim is that the Maritime Administration ("Marad"), if it eventually guarantees the bonds, will somehow approve, or fail to detect, agreements that will confer impermissible control over the operation of the dredger on a Dutch company, RBKW, and its domestic subsidiary, Stuyvesant.

[1] Numerical citations followed by the letter "a" are to pages of the joint appendix filed in plaintiff's appeal to the court of appeals. Citations to Great Lakes' Petition for a Writ of Certiorari appear as "Pet." followed by a page number.

[2] Private defendants, respondents herein, are: Jackman & Company ("Jackman"), David H. Jackman (deceased August 29, 1980), National Dredging, Inc. ("National"), Royal Boskalis Westminster N.V. (formerly Royal Bos Kalis Westminster Group N.V.) ("RBKW"), Stuyvesant Dredging, Inc. ("Stuyvesant"), United States Corporation Company ("USCC"), United States Trust Company of New York ("USTC"), Warburg Paribas Becker Incorporated and Williams-McWilliams Co., Inc. ("Williams-McWilliams").

A. Summary of Facts

Title XI embodies a program under which the Government guarantees bonds for the construction of dredgers as well as other U.S.-flag ships (46 U.S.C. §§ 1271(b), (c), 1273(a)). The private defendants and others are in the process of attempting to put together a transaction for the financing, chartering[3] and operation of a dredger that will qualify for this program. *See, e.g.*, 155a-61a; 231a-33a.

On November 5, 1979, based, as is customary, on an outline of the proposed transaction, Marad issued a Letter Commitment under Title XI to guarantee bonds for the construction of this dredger—up to $30,579,000 (127a-29a) (the total cost of construction will exceed $50 million, so that the prospective beneficial owner of the dredger will invest the additional $20-plus million required, 156a, 158a, 232a-33a).

That Letter Commitment is subject to various conditions: *e.g.*, that the final documentation (the financing, chartering and management agreements) be in form and substance satisfactory to Marad (127a-35a, 162a), and that all parties required to be U.S. citizens (the owner, operator and bareboat charterer) remain so (133a). The proposed time charterer, Stuyvesant, is not required to be a U.S. citizen, because the maritime laws expressly authorize non-U.S. citizens to time charter U.S.-flag ships with Marad's approval (46 U.S.C. §§ 808, 839), and nothing in Title XI prohibits loan guarantees to trans-

[3] Charters are of two principal kinds, bareboat (or demise) charters and time charters. In *Guzman v. Pichirilo*, 369 U.S. 698, 699-700 (1962) this Court described the difference as follows:

> "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee. . . . It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all."

See also 165a-66a, 233a-34a.

actions involving a non-U.S. time charterer (46 C.F.R. § 298.10(a); 234a). In fact, Marad frequently approves time charters to noncitizens for vessels financed under Title XI.

Under Marad practice, after the parties have reached agreement on the final documentation, Marad will determine whether those papers satisfy the conditions of the Letter Commitment (241a). If it determines they do, it will issue another commitment in printed form, which is also subject to many conditions, including that of the continued U.S. citizenship of parties required to be U.S. citizens as well as most of the other conditions set forth in the Letter Commitment (except, of course, those relating to the content of the final documentation which, by this time, will have been prepared and approved) (*see* 164a-65a, 171a *et seq.*). The parties and Marad will then execute the final documentation; Marad will actually guarantee the bonds; and the bonds will be offered for sale with that guarantee (*see* 241a).

In reliance on the November 1979 Letter Commitment, and with Marad's knowledge that they would so rely, the parties, including the prospective owner, operator, builder and time charterer of the dredger, materially changed their positions by executing various agreements, including a construction contract with Avondale Shipyards, binding themselves to proceed with the project (207a, 215a, 234a-35a, 242a-43a). As a result, major construction work is ongoing, with Avondale committed for millions of dollars worth of supplies, parts and equipment (215a).

The dredger will be constructed entirely in a U.S. shipyard (Avondale) and will be a U.S.-flag ship (167a, 214a, 234a-35a). Its beneficial owner will be BameriLease Capital Corporation ("BameriLease"), a subsidiary of Bank of America National Trust and Savings Association ("B of A") (157a). Legal title to the dredger will be placed in a U.S. trust company, as Owner Trustee, which is

the Title XI applicant and owner-obligor (157a, 161a, 231a & n., 232a-33a).[4]

The bareboat charterer of the dredger will be National, a special purpose corporation formed by USCC through its nominee partnership, Jackman (161a, 201a).[5] Under the management agreement, however, National will delegate the entire operational control of the dredger to Williams-McWilliams (161a, 202a, 210a-11a), an indirectly wholly owned subsidiary of Zapata Corporation (209a-10a). Williams-McWilliams will, accordingly, operate the vessel and furnish its master and crew (all of whom will be American seamen) (158a-59a, 210a-11a).

Williams-McWilliams could have become the bareboat charterer of the vessel rather than the bareboat charterer's managing agent, but this was unacceptable to Zapata (160a, 210a). For in that event, the bareboat charter hire payable to the Owner Trustee (more than $50 million) might have to be capitalized as a liability on Zapata's consolidated balance sheet, especially since Stuyvesant negotiated an option to cancel the time charter at any time (so as to preclude the possibility that the time charter hire might have to be capitalized on RBKW's consolidated balance sheet) (159a-60a, 210a). This was the reason for the retention of USCC to establish and

[4] The trust company which Marad approved as obligor was the United States Trust Company. Recently that company had to withdraw from the transaction for reasons unrelated to this suit, and, with Marad approval, Hartford National Bank and Trust Company has replaced it.

[5] USCC is engaged in the business of performing a variety of corporate services including, as a part of its normal service business, the establishment and maintenance of special purpose corporations (199a-200a). As explained in the affidavit of David H. Jackman, limitation of the "liabilities and balance sheet exposure of the participants" in business ventures is "often essential to the[ir] fruition"; and the business community is aware that the use of a special purpose corporation has this effect (200a).

To facilitate corporate formalities, the stock in the special purpose corporations established by USCC is routinely held (as is National's) by USCC's nominee partnership, Jackman, whose partners (all U.S. citizens) are officers of USCC (201a-02a).

maintain a special purpose corporation, National, as bareboat charterer (160a-61a, 200a-01a; *see* 210a).

There is no dispute in this case regarding the U.S. citizenship of B of A, BameriLease, the Owner Trustee, Williams-McWilliams or Zapata. There is also no dispute that USCC, Jackman and National are U.S. citizens; what plaintiff questions is whether National is somehow controlled by RBKW or Stuyvesant.

Plaintiff has asserted in conclusory form (in its complaint and affidavits below, and now its petition) that RBKW is an "undisclosed principal" of USCC, that RBKW "caused" National to be created, that "the various agreements" pertinent to this transaction will confer a bareboat, not a time, charter on Stuyvesant, and by that means will vest "exclusive control" of this dredger in RBKW (Pet. 4, 5).

Defendants, however, moved for summary judgment with affidavits both denying the existence of any such agreement, understanding or relationship (166a, 202a-03a), and demonstrating the extreme implausibility (indeed, the self-defeating nature) of any such arrangement (*see* pp. 25-26 *infra*)—and there is nothing in plaintiff's affidavits to contradict that showing.[6]

Moreover, if the time charter finally executed is not a true time charter, in the sense of giving impermissible rights of control of the dredger to Stuyvesant, it will not meet the objective criteria imposed by the Letter Commitment, and the Title XI guarantee will not be issued unless and until the time charter is made to meet such criteria.

B. The Decisions Below

The district court held that the interest plaintiff sought to prosecute in this suit—the insulation of itself from possible future competition from this dredger—was not within the zone of interests to be protected by the

[6] Plaintiff, afforded the opportunity for discovery on this issue, collected documents from and deposed an officer of USCC.

statute in question, even assuming, *arguendo*, all plaintiff's conclusory assertions to be true:

> "The objective of Title XI . . . is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards. The citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war . . . .
>
> "There is no suggestion in Title XI that Congress intended to give one subsidized shipowner, such as plaintiff, any voice in deciding what its competition should be." Pet. 6a.

The court of appeals summarily and unanimously affirmed:

> "Great Lakes' interest in restricting competition is not an interest covered by Title XI. Great Lakes therefore has no standing to bring this action." Pet. 3a.[7]

ARGUMENT

POINT I

THE DECISIONS BELOW TO DISMISS FOR LACK OF STANDING ARE PLAINLY CORRECT, FULLY COMPORT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, AND PRESENT NO REASON FOR THE GRANT OF CERTIORARI.

Both the district court and a unanimous panel of the court of appeals have held that Title XI has nothing

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[7] Thus, contrary to plaintiff's assertion, the decisions of the district court and court of appeals below were perfectly consistent—in method as well as outcome. Both courts decided that Title XI, the statute plaintiff claims was violated, was the statute whose purpose should determine the relevant zone of interest (Pet. 2a-3a, 5a-6a). Each court then decided that plaintiff's interest in restricting competition was not an interest germane to Title XI (*id.*). The only difference between the opinions of the two lower courts was that the district court more fully elaborated the reasons for its conclusion.

whatever to do with, let alone seeks to protect, plaintiff's interests in avoiding any future competition from the BameriLease dredger. Hence, the courts below correctly concluded that such interests are *not* "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

There is nothing in that conclusion meriting, much less requiring, review by this Court. It represents a commonplace application of a prudential limitation on standing established by this Court, and, indeed, well illustrates the soundness of that limitation.

A. The Correctness of the Decisions Below

1. Title XI of the Merchant Marine Act of 1936 is a Government assistance program that is entirely between the Government and the recipient of the grant. As stated in the House report:

> "The purpose of this bill is to encourage the use of private capital in the financing of ship construction." H.R. Rep. No. 1042, 83d Cong., 1st Sess. 1 (1953).[8]

[8] Plaintiff criticizes the court of appeals purportedly for relying "exclusively" on the above Report which, according to plaintiff, accompanied a mere "procedural" amendment to Title XI (Pet. 15 & n.).

In reality, the 1953-54 amendments completely transformed Title XI—*see, e.g.*, H.R. Rep. No. 2450, 83d Cong., 2d Sess. 1-2 (1954):

> "By reason of the inherent uncertainties in the business of operating ships, private capital has been reluctant to undertake to any appreciable extent the risks of lending money secured by ship mortgages. Such private financing is desirable not only because it will take the Government out of the business of lending money but also because it will tend to enlist the aid of the banking business in the problems of the American merchant marine. However, title XI of the Merchant Marine Act, 1936, as originally enacted, was limited in scope and did not prove effective. In an attempt to broaden the field to encourage private financing, the committee in 1953 reported the bill that subsequently became Public Law 288. This provided for a guaranty by the Secretary of Commerce of up to 90 percent of the amount of a ship mortgage but certain of its provisions, particularly those with reference to foreclosure on

When the Government decides that its purpose will be achieved by the grant of such a loan guarantee, or the commitment to do so, no one else's pocketbook is affected in the slightest. And no one else is intended to be protected, because there is nothing they need protection from.

For example, the grant of a loan guarantee in the present transaction will take nothing away from plaintiff. Plaintiff has already received more than $26 million in loan guarantees under the Title XI program, and could

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default, proved to be unworkable. This bill is the result of the committee's effort to overcome the shortcomings revealed by experience in Public Law 288 [67 Stat. 626 (1953)]."

Accord, S. Rep. No. 1804, 83d Cong., 2d Sess. 4 (1954) ("It would seem in keeping with uniform congressional intent that Title XI now, finally, be made to do the job for which it was designed.").

Plaintiff further suggests that the House Committee Report statement, quoted above in text, "conflicts with the enacting clause" of the 1938 amendment by which Title XI was added to the Merchant Marine Act of 1936 (Pub. L. No. 75-705, 52 Stat. 953 (1938)) (Pet. 15 n.). But Pub. L. No. 75-705, of which Title XI was a small and then fledgling part, stated simply, in its enacting clause, that its purpose was "to amend the Merchant Marine Act, 1936, to further promote the merchant marine policy therein declared [at 46 U.S.C. §1101, discussed pp. 13-14 *infra*], and for other purposes". The statement of the House Committee Report quoted above in text, as well as numerous subsequent congressional reports to the same effect regarding the specific purposes of Title XI, are perfectly compatible with that enacting clause (which is, indeed, of almost meaningless generality). *See, e.g., Hearings on H. R. 8637 Before the House Comm. on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. 24-25, 47-48, 51, 59, 78, 118, 121-22 (1954) ("This is not particularly a shipper's bill so much as it is an investor's bill, to interest investors and banking people in financing the American merchant marine . . .", *id.* at 24); H. R. Rep. No. 2450, 83d Cong., 2d Sess. 1-3 (1954); 100 Cong. Rec. 4042-43 (1954) (Statement of Sen. Butler); S. Rep. No. 2632, 84th Cong., 2d Sess. esp. at 1, 4 (1956) (reporting on a bill "to facilitate private financing of merchant vessels in the interest of national defense"); H. R. Rep. No. 1953, 85th Cong., 2d Sess. (1958); H. R. Rep. No. 688, 92d Cong., 1st Sess. 2, 14 (1971); S. Rep. No. 1137, 92d Cong., 2d Sess. 1-2 (1972).

It should also be noted that the court of appeals had before it all aspects of legislative history that were even arguably pertinent to this matter, presented by both sides.

obtain as many additional grants as it could justify to Marad, irrespective of the grant involved in this case.

2. Numerous cases stand squarely for the proposition that the competitive interests of competitors of parties benefited by governmental assistance programs are not within the zone of interests sought to be protected by such programs—*e.g.*, *Rodeway Inns of America, Inc. v. Frank*, 541 F.2d 759, 765-66 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) (holding that various hotel owners had no standing to challenge the conversion of a HUD-financed apartment building into a prospectively competing hotel because the National Housing Act was designed to promote construction, not to protect competitors); *Hood River County v. United States Dep't of Labor*, 532 F.2d 1236, 1238 (9th Cir. 1976) (per curiam) (holding that plaintiff organizations had no standing to challenge the Department of Labor's grant to a competitor because, *inter alia*, the program involved was aimed at aiding the migrant workers ministered to by the complaining organizations, not the organizations which received the grants).[9]

[9] *See also Clinton Community Hospital Corp. v. Southern Md. Medical Center*, 510 F.2d 1037 (4th Cir.) (per curiam), *cert. denied*, 422 U.S. 1048 (1975) (holding that plaintiff hospital had no standing under the Federal environmental laws to challenge the construction of a competing hospital pursuant to a grant of feasibility from HEW to obtain financing from HUD); *Rural Electrification Administration v. Central Louisiana Electric Co., Inc.*, 354 F.2d 859, 865 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966) (holding that a competitor electric utility lacked standing to enjoin a loan by the Rural Electrification Administration to an electric cooperative for construction of facilities); *Barry v. Housing and Home Finance Agency*, 340 F.2d 939, 940 (2d Cir. 1965) (per curiam) (holding that competitor hotel owners lacked standing under the Federal Housing Act, 42 U.S.C. § 1456(g), to enjoin an urban redevelopment project including transient housing units because there was "no indication either in the language of [§ 1456(g)] or in the legislative history of any . . . intent" to confer standing); *Window Systems, Inc. v. Manchester Memorial Hospital*, 424 F. Supp. 331, 336-38 (D. Conn. 1976) (holding that an unsuccessful bidder was outside the zone of interests protected by the Hill-Burton Act, 42 U.S.C. § 291, which was directed toward the construction, modernization and improvement of hospitals to upgrade medical services available to all people).

Below, plaintiff attempted to distinguish those cases on the ground that they did not involve statutes like Title XI, which hinges Government assistance on a citizenship requirement. But that is hardly a distinguishing ground.

All Government assistance programs hinge assistance on applicants' meeting specified qualifications (whether citizenship, as in Title XI, or other qualifying tests). Thus, all cases cited above involved the complaints of competitors of applicants that the applicants had not satisfied the statutory criteria and were therefore being unduly favored over the competitors who allegedly had. The consistent ruling of those cases has been that the objectives of the qualifying criteria in a Government assistance program are to further *public* interests—not the self-interests of the recipient's competitors.

So here.

3. It is therefore not surprising that there is absolutely nothing in the language of Title XI or its legislative history (*see, e.g.*, history cited note 8 *supra* and note 19 *infra*) that indicates the slightest concern with entrenching the competitive positions of shipowners such as plaintiff—and there is not the slightest reason for that statute to protect any such position.

On the contrary: Congress made Title XI guarantees and commitments to guarantee "conclusive" and "incontestable" (46 U.S.C. §1273(e)). If Congress intended to allow plaintiff and similarly situated claimants to prosecute their interests against competition by challenging Title XI grants, it is hardly likely that Congress would have removed those grants from private litigation by enacting that "incontestability" provision.

4. Disregarding these clear statutory indications, plaintiff claims that *all* citizenship requirements of *all* provisions of the Jones Act, the Merchant Marine Act of 1936 and other maritime statutes must be construed as evidencing Congressional intent to insulate plaintiff (and other domestic operators) from foreign competition. This

conclusion is arrived at by reading the specific purposes of several citizenship requirements of the Jones Act into the preamble of the Jones Act (46 U.S.C. § 861, which simply declares that the United States, for general purposes of defense and commerce, shall have a merchant marine owned and operated by citizens of the U.S.); from there, into the preamble to the 1936 Act (46 U.S.C. § 1101, which states the same general objective); and from there into all citizenship requirements of all titles of the 1936 Act and others.

There are three basic reasons why this process of statutory construction is an untenable "house of cards."[10]

First, the very fact that the Jones Act, enacted in 1920, had already prohibited all foreign-owned and foreign-controlled ships from engaging in the coastwise trade (46 U.S.C. § 883), made it entirely unnecessary for Congress to attempt to serve any such purpose by the enactment, eighteen years later, of Title XI.

Second, in the few instances in which Congress has intended to protect U.S. coastwise operators from competition of any sort—primarily where they would otherwise face unfair competition from more cheaply built and operated foreign ships (§ 27 of the Jones Act, 46 U.S.C. § 883) or from U.S. ships originally subsidized for the foreign trade (Titles V and VI of the 1936 Act)—there is both an obvious need for so doing and an unambiguous expression of that intent. *See also* 46 U.S.C. §§ 1158, 1171(a), 1172, 1173(b), 1174, 1175(c), 1222, 1223(a); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 574-75, 586-88 (1980) ("*Seatrain*") (holding that "[i]t was not the purpose of the [1936] Act to prohibit [the] entry" into the "domestic trade" of a vessel on an economic "footing equal to that of vessels already in that trade", *id.*

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[10] For a discussion of the fact that the citizenship requirements of different statutes often have different objectives, *see* Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961).

at 590); *Matson Navigation Co. v. Connor*, 258 F. Supp. 144, 149 (N.D. Cal. 1966), *aff'd per curiam*, 394 F.2d 514 (9th Cir.), *cert. denied*, 393 U.S. 998 (1968).

Here, there is neither.

Third, to import the *general* purposes of either the 1936 Act or the Jones Act into Title XI would no more assist petitioner's zone contentions than do the specific purposes of Title XI.

The fact that the 1936 Act's goals include, as petitioner stresses, encouraging the development of a merchant marine "owned and operated under the United States flag by citizens of the United States, insofar as may be practicable" (46 U.S.C. § 1101(c)), does not signify any desire to insulate such vessels from competition of any sort—but rather to ensure the American people adequate service and equitable rates, to guard against the interruption of shipping service during wartime, and, vitally, to make the fleet available for national defense. H.R. Rep. No. 2168, 75th Cong., 3d Sess. 3-6 (1938); *accord, e.g.*, H.R. Rep. No. 1277, 74th Cong., 1st Sess. 4-5, 8-9 (1935).[11]

This conclusion is confirmed by the original version of § 1101(c) which set forth the purpose manifested by the legislative history on the face of the statute itself:

> "(3) owned and so operated under the United States flag by citizens of the United States and so regulated by the Government *as to secure to the*

[11] Congress' chief concern was to avoid a repetition of the World War I situation in which the European nations withdrew their ships and seamen from the U.S. trade to act as naval and auxiliary units in the European war theatre. As a result, this country was left without bottoms for its imports and exports, without seamen sufficient to crew its few American-flag vessels, and without sailors and ships to call upon for its own wartime effort. *See, e.g.*, H.R. Doc. No. 118, 74th Cong., 1st Sess. 21 (1935); 80 Cong. Rec. 9899 (1936) (Remarks of Sen. Guffey); *id.* at 9906 (Speech of Sen. McAdoo); 80 Cong. Rec. 10572 (1936) (Remarks of Sen. Crawford); *id.* at 10575 (Remarks of Rep. Sirovich).

shipper and receiver of products in the domestic and foreign waterborne commerce of the United States adequate service and equitable rates. . . ." S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935) (emphasis added).

Moreover, there is no more indication in the general policy declarations of the Jones Act than there is in those of the Merchant Marine Act of 1936 of any Congressional objective of insulating plaintiff from competition of any kind—and, of course, far less basis for importing these provisions into an entirely different statute.[12]

Indeed, Section 29 of the second committee print of the Jones Act (forerunner of current 46 U.S.C. § 883, the key provision defining the eligibility requirements for vessels in the coastwise trade) did not even contain a citizenship requirement until the U.S. Shipping Board recommended it as "vital for the preservation of our maritime security". S. Rep. No. 573, 66th Cong., 2d Sess. 9 (1920). The Board's concern was that "[u]nless our coasting fleet be wholly and unequivocally owned by loyal United States citizens, it can not be rated a dependable unit in time of national emergency" (*id.* at 10), *not* that it would remove competitive risks.

B. Alleged Conflict with Decisions of This Court

1. Plaintiff cites *Seatrain, supra*, 444 U.S. 572 (1980), as a decision of this Court that "supports the position of petitioner" (Pet. 16). In fact, *Seatrain* had nothing to do with a citizenship eligibility requirement, but rather concerned a restriction (46 U.S.C. § 1156) against U.S. *citizen-owned* ships subsidized for the foreign trade coming into the coastwise trade and competing unfairly with unsubsidized vessels, 444 U.S. at 574, 588-90. Domestic companies potentially impacted by such unfair competition are obviously within the zone of interests sought to be protected by that restriction.

[12] *See also Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 295 & n.5 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964).

That, however, is not plaintiff's case.[13] Plaintiff cannot complain that it will suffer any competitive cost disadvantage as a consequence of the Marad action in this case; on the contrary, plaintiff is saying: don't grant a loan guarantee in this instance—and do take business away from American shipyards, do take jobs away from American workers, and do take a prospective U.S.-flag ship away from the American fleet—despite the fact that the dredger in question will derive no cost advantages whatever, *vis-a-vis* plaintiff, as a result of receiving that loan guarantee.

There is not a single provision of maritime law designed to further such interests—and certainly Title XI has no such objective.

2. Plaintiff further contends that the district court's finding regarding the purposes of Title XI conflicts with this Court's dictum in *Central Vermont Transportation Co. v. Durning*, 294 U.S. 33 (1935),[14] adverting to the purposes of 46 U.S.C. § 883. But that 1935 Jones Act decision could not have had anything to do with the purposes of other statutory programs enacted one year (the Merchant Marine Act of 1936) and three years (Title XI) later.

Thus, what plaintiff is really saying here—and the proposition to which all its contentions repeatedly come down—is that if plaintiff's interests are within the zone of interests of any citizenship provision of the Jones Act,

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[13] In fact, Bazelon, J., dissenting from the decision this Court reversed in *Seatrain*, made clear the distinction between the facts of that case and those of a case such as this:

> "Although the nation's merchant marine policy does shield domestic carriers from competition by foreign built vessels, as well as from unfair competition by subsidized vessels, it was not intended to limit the competition among American built, unsubsidized vessels." *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814, 843 n.16 (D.C. Cir. 1979) (Bazelon, J., dissenting), *rev'd sub nom. Seatrain, supra*, 444 U.S. 572 (1980).

[14] *Central Vermont* was an action by a non-citizen shipowner against a collector of customs to restrain the seizure of merchandise transported by the shipowner. 294 U.S. at 34-35.

they must be within the zone of all such provisions of the 1936 Act; and that is fallacious on its face.

C. Alleged Conflict Among Circuits

1. The plain fact is that no conflict exists among the circuits in the application of the zone test to cases such as this. On the one hand, as reviewed above (pp. 10-11 & n.9), many decisions have denied standing to competitors of the recipients of Government assistance programs; and, on the other hand, as plaintiff's counsel admitted at oral argument before the court of appeals, there appears to be no "standing case involving government subsidies in which someone has been able to in effect enjoin the granting of the subsidy" (colloquy between Judge Oakes and Mr. Norton, Tr. 10).

2. Plaintiff nevertheless purports to find a conflict among circuits in that

> "The District of Columbia Circuit has decided, at least with respect to the Internal Revenue Code, that only the specific section of the statute allegedly violated should be examined [*Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) ("*Tax Analysts*")], while most courts look to the statute as a whole, or to other statutes which were intended by Congress to be construed in harmony with the one allegedly violated." Pet. 13-14 (footnotes omitted).

But that is not a "conflict" among circuits; those decisions are perfectly consistent. All the District of Columbia Circuit stated in *Tax Analysts* is that litigants cannot

> " 'borrow' the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision *where that intent is not evident*, in order to satisfy the zone test. A contrary decision in this context would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent. . . ." *Id.* at 141 (emphasis added).

No decision of any court of appeals conflicts with that obviously logical proposition. On the other hand, nothing in *Tax Analysts* negates the proposition that other sections of the same statute, or other statutes, may be consulted in zone-test analyses if they can be shown to share an identity of purpose with the section allegedly being violated. (Rather, exactly that is indicated by the court's reference to the fact that the "Internal Revenue Code is an extraordinarily complex statute which does *not* have a single, unified purpose", *id.* (emphasis in original).)

Thus, when plaintiff argues here that the objectives of the citizenship requirements of certain restrictive provisions of the Jones Act must be examined to determine the purpose of the citizenship requirements of Title XI, plaintiff is arguing—and arguing erroneously—from the very conclusion that plaintiff is attempting to prove: that all those provisions have "a single, unified purpose".[15]

[15] One fact (among many others) clearly indicating the widely *diverse* purposes of the hundreds of provisions of maritime laws is that at least ten different government agencies or departments are authorized to administer and issue regulations for implementing those purposes—*viz.*, Marad, the Federal Maritime Commission, the U.S. Coast Guard, The National Shipping Authorities, the National Maritime Fisheries Service, the National Oceanic and Atmospheric Administration, the U.S. Customs Service, the Internal Revenue Service, the General Accounting Office, and the Department of State. *See, e.g.*, 46 C.F.R. § 529.1(a); 46 C.F.R. § 10.01-1(a); 50 C.F.R. § 251.3; 19 C.F.R. § 12.85; 26 C.F.R. Part 2; 4 C.F.R. § 52.2; 22 C.F.R. Part 82.

Moreover, the lower courts have found that this diversity of purpose results in conflicts. *See, e.g., American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1166 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979) (holding that the protective intent of § 27 of the Jones Act did not override the "quite separate" national policies of § 21 of the *same Act*); *Safir v. Gibson*, 417 F.2d 972, 976 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970) ("We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the general policy of the Act to build up the American merchant marine through subsidy payments and the direction of § 810 [46 U.S.C. § 1227] for withdrawal of those subsidies when they are used to hurt rather than help."); *Matson Navigation Co. v. Connor, supra*, 258 F. Supp. at 147, 153-54.

D. Alleged Need for This Court's Resolution of Issues

Plaintiff suggests that there is just something wrong (although plaintiff never states what) with the zone test itself so that certiorari should be granted to review that test, irrespective of whether it was properly applied to this case. In fact, however, the application of the test to this case demonstrates the soundness of this prudential limitation.

Were it not for this restriction on standing, the first business entity to avail itself of a Government assistance program in any line of commerce could substantially frustrate the grant of similar assistance to actual or possible competitors by bringing vexatious litigation and tying the program up in the courts interminably. That course of conduct would achieve not only the selfish objectives of the claimant but also an obstruction of the statutory goals.

And that is precisely what would happen as a result of this suit if plaintiff had standing to pursue it. As stated by Marad—the agency charged with the responsibility of administering and policing compliance with the Title XI program—

> "Frustration of the project after issuance of the Letter Commitment causes not only injury to the applicant but also harm to the Government. Not only does it waste time and resources, it damages the credibility of Marad's determinations necessary for approval of Title XI applications. This damage in turn gravely diminishes the faith in and reliance on the Letter Commitment of other applicants. The inescapable result will be that Marad's statutory goal—promotion of the Merchant Marine—is seriously threatened." 243a.

POINT II

FAR FROM SHOWING, AS PLAINTIFF ASSERTS, THAT IT WOULD PREVAIL IN THIS CASE IF ZONE RESTRICTIONS WERE LIFTED, THE RECORD DEMONSTRATES THAT PLAINTIFF'S CLAIMS ARE NEITHER JUSTICIABLE NOR SUPPORTED BY INJURY IN FACT, ARE PRECLUDED BY THE INCONTESTABILITY PROVISION OF TITLE XI, AND OTHERWISE FAIL TO RAISE GENUINE TRIABLE ISSUES.

A. Lack of Justiciability and Injury in Fact

1. The transaction plaintiff attacks is far too indefinite at this stage, and the injury plaintiff prophesizes is far too improbable and remote, to sustain Article III standing on either justiciability or injury-in-fact grounds.

For the purposes of disposing of this case on "zone of interests" grounds, the court below assumed future injury, *arguendo*, by postulating that, if Congress intended to protect plaintiff's present monopoly position, the future entry of any competing dredger would dislodge that monopoly and constitute "injury in fact" (Pet. 5a).[16]

But that *arguendo* assumption is plainly invalid (as the district court itself found in applying the zone test, Pet. 5a-6a); it is not, in any event, plaintiff's theory of injury (as plaintiff's counsel stated on oral argument, "plaintiff's contention is not that it doesn't want competition," Pet. 7a); and it would be conceptually unsound if it were.

Plaintiff, a business entity, cannot sustain future, cognizable injury unless and until it has suffered a loss of profits that would have been earned, but for the act

[16] Contrary to plaintiff's assertion (*see* Pet. 7-8), the district court did not "find" anything regarding injury in fact, and consequently no such "finding" was before the court of appeals (Pet. 5a; *see* Pet. 2a-3a).

complained of. Relinquishment of a monopoly position is irrelevant, if it will not result in such a loss. Moreover, the alleged "illegality" of prospective competition from the BameriLease dredger is equally irrelevant, if the entry of that dredger into plaintiff's market would in no way diminish plaintiff's profits. For plaintiff's claim of "injury in fact" to be substantiated, there must be a causal connection between the issuance of the Letter Commitment to defendants and an imminent, probable, tangible loss to plaintiff,[17] and plaintiff can establish none of these elements.

Several of the many contingencies precluding this claim are summarized briefly below.

2. The final documentation of the transaction in question has not yet been agreed upon by the parties and, of course, not yet approved by Marad. One party, the United States Trust Company, has already withdrawn from the transaction; a new company to perform the function of Owner Trustee has just been found; negotiations are now ongoing to replace the original time charterer by a partnership between Stuyvesant and a subsidiary of Williams-McWilliams; and other substitutions or realignments of parties are possible.

3. The dredger itself, though now under construction, will not be completed for almost two more years. At that time it must be approved by three separate Government agencies (the Coast Guard, regulating safety and engineering, *see, e.g.*, 46 C.F.R. subchapters E, F, I, J; the Federal Maritime Commission, implementing financial

[17] *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (and cases cited therein); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-08, 514-16 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Linda R. S. v. Richard D.*, 410 U.S. 614, 616-18 (1973); *American Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 148-50 & n.2 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1050-51 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978).

responsibility regulations for water pollution control, *see* 46 C.F.R. Part 542; and the FCC, regulating ownership and operation of radios, *see* 47 C.F.R. Part 83) and then undergo a new administrative proceeding in order to be registered and enrolled by the United States Coast Guard for the coastwise trade (*see* 46 U.S.C. §§ 19, 251-60, 292; 46 C.F.R. subchapter G). And while such a ruling would be two years closer to any putative loss to plaintiff, even an enrollment determination of that nature has been held too "speculative" a basis for injury in fact to permit the competitor standing to attack it. *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 297 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964).

4. Even after enrollment, it is virtually certain that this dredger will not take any business away from plaintiff that plaintiff needs for the maximization of its profits.

Until recently, the Army Corps of Engineers had a complete monopoly on all major dredging projects in the United States. The Rivers and Harbors Improvements Act of 1978, amending 33 U.S.C. §§ 622 and 624, directed the Corps to withdraw its fleet *pro tanto* with the entry of a privately owned fleet capable of performing the large quantity of dredging work available (33 U.S.C. § 622(b)). Hence, the BameriLease dredger will be capturing business, not from plaintiff, but from the Army Engineers, which is precisely the intendment of that statute.

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[18] Similarly, these circumstances render plaintiff's claims nonjusticiable. *See Poe v. Ullman*, 367 U.S. 497, 528 (1961) (Harlan, J., dissenting) ("some further procedure, some further contingency of application or interpretation, whether judicial, administrative or executive, . . . serve[s] to make remote the issue which [is] sought to be presented to the Court"). At this point in the BameriLease project, the only judicial opinion possible would be "an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). But a hypothetical or conjectural threat is not enough, *O'Shea v. Littleton, supra*, 414 U.S. at 494, 496-97; the doctrine of ripeness requires that the threatened injury be "certainly impending". *E.g., Babbitt v. United Farm Workers Nat'l Union, supra*, 442 U.S. at 298.

Indeed, under Section 622(b), plaintiff can have all the dredging work its ships can handle, whether or not the BameriLease dredger enters the market; all plaintiff need do is persuade the Chief of Engineers that it can do the work at "reasonable prices and in a timely manner" (33 U.S.C. §622(a)).

5. Among the many other infirmities of plaintiff's Article III contentions is the fact that, if the BameriLease dredger were actually capable of taking from plaintiff any business it needed for the maximization of its profits, then that would occur irrespective of any injunction in this case.

The BameriLease dredger will be, as plaintiff agrees, the "most technologically advanced hopper dredge in America" (Pet. 3). It has been under construction for more than nine months, and many millions of dollars have already been committed to that construction (*see* 214a-15a). As a practical matter, it can be operated only in the United States, because it is uneconomical for a dredger built for $50 million in the United States to compete in foreign commerce with those built for a fraction of that cost in Korea, Hong Kong or any of the other principal foreign shipbuilding ports (211a-12a; *see, e.g., Seatrain, supra*, 444 U.S. at 574-76).

Realistically, therefore, no injunction issued in this case would prevent the completion of construction or the eventual operation of this dredger in the domestic coastwise trade. Either it would be sold for that purpose, or, far more likely, the sole basis of plaintiff's complaint—the alleged taint on National's citizenship—would be immediately removed, simply by dissolving National and getting some other institution to form a new special purpose corporation whose citizenship could not be challenged even by an imaginative litigant such as plaintiff. The outline of the transaction that Marad had previously approved would then be finally approved, and the transaction, if it is otherwise viable, would go forward. Plaintiff, by obtaining an injunction based on National's participation, would have gained nothing at all.

In short, plaintiff has not, and cannot, carry its burden of showing that the injunction it seeks will prevent (or redress) the injury it postulates. *See Simon v. Eastern Ky. Welfare Rights Org., supra*, 426 U.S. at 45; *Warth v. Seldin, supra*, 422 U.S. at 515; *City of Hartford v. Towns of Glastonbury, supra*, 561 F.2d at 1051.

B. Incontestability

1. That plaintiff lacks standing to contest Marad determinations under Title XI is no Congressional oversight but part of a well thought-out plan to attract private capital to the merchant marine. A second part of this plan is implemented in 46 U.S.C. § 1273(e), by which Congress *precluded* direct judicial review of commitments to guarantee and guarantees under the Title XI program. In recognition of its importance to the Title XI program, Congress successively amended this section until it removed all exceptions to its grant of incontestability. That section now reads:

> "Any guarantee, or commitment to guarantee, made by the Secretary of Commerce under this subchapter shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee, or commitment to guarantee, so made shall be incontestable." 46 U.S.C. § 1273(e).[19]

2. Plaintiff conceded below that this provision precludes judicial review of commitments to guarantee and guarantees, but claimed that it was inapplicable to Letters Commitment.

[19] The legislative history also demonstrates that Congress meant the "conclusive" and "incontestable" provisions to be as absolute as the English language could make them, in order to reassure investors and their counsel of the complete security of the Government commitment. *See, e.g., Hearings on H. R. 8637 Before the House Comm. on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. 19-22, 24, 67, 105, 111-14 (1954); H.R. Rep. No. 688, 92d Cong., 1st Sess. 6, 9 (1971); S. Rep. No. 1137, 92d Cong., 2d Sess. 5, 8 (1972).

The statute itself, however, makes no such distinction. And Marad's regulations state flatly that a Letter Commitment embodies "the Secretary's commitment to execute Guarantees" (46 C.F.R. § 298.2(k)). Consistently, the Letter Commitment itself provides that it can be "terminated" by the Secretary if not "accepted" by the parties within thirty days (135a). If the commitment embodied by the Letter Commitment were not a binding, enforceable obligation within its terms (and within the normal meaning of the word "commitment" used in Section 1273(e)), there obviously would have been no reason to have provided for its "termination".

3. Plaintiff asserted below, without benefit of supporting authority, that the incontestability feature was intended *exclusively* for the benefit of subsequent purchasers of bonds.

The contention is self-evidently wrong. If it were true, there would have been no reason whatever for making commitments incontestable as well as guarantees; for only the parties to the initial financing transaction have any interest in the incontestability of commitments to guarantee; bondholders are interested solely in the incontestability of the guarantee itself.

4. Finally, if the industry could not so rely upon the Letter Commitment as an incontestable commitment to guarantee,[20] there would be little or no private investment in the merchant marine. Title XI would fail of its purpose.

Bankers will not commit funds to a project at interest rates low enough to ensure its economic viability unless and until they know those funds to be secure because the Government has committed itself to guarantee them (*see* 207a). Further, many of the terms of agreements among private parties to financings cannot even be specified prior to the Government commitment because that com-

[20] Marad purposely encourages that reliance. 242-43a; *see* Cook, *Government Assistance in Financing Title XI Guarantees*, 47 TUL. L. REV. 653, 672, 677-78 (1973) (authored by the former General Counsel of Marad).

mitment *sets* those terms (241a). And the commitment which sets those terms cannot be the printed commitment, for that document is issued only after all the private documentation of the project has been agreed upon (240-41a).

In sum, the Letter Commitment is the linchpin of the Title XI program. It embodies the fruit of Marad's investigations of a project and negotiations with the applicant (235a-40a); and it furnishes the private parties a focus for negotiation and the security to justify investment of the time and money necessary to conclude their negotiations (*see* 242a-43a).

C. Lack of Any Genuine Issue of Fact Regarding the Rationality or Legality of the Marad Commitment

1. Plaintiff's attempt to show that Marad acted illegally or capriciously in issuing the Letter Commitment (*see* 5 U.S.C. § 706) rests, not on any showing of "specific facts" as required by FED. R. CIV. P. 56, but on studious and obvious misconceptions.

Briefly, the core of plaintiff's complaint is that RBKW controls National, the bareboat charterer, impermissibly tainting National's U.S. citizenship under Marad regulations (*see* 46 C.F.R. § 298.10(a)). But plaintiff has offered no shred of evidence to show either that RBKW is National's "undisclosed principal" or that Marad will permit RBKW (through Stuyvesant) to arrogate to itself the powers of bareboat charterer; and for RBKW to assume either of those roles would be for it to assume a $50 million liability on its balance sheet in return for nothing at all.

On the one hand, it must be recalled that the Marad commitment is conditioned on the fact that National will delegate the entirety of the operation of the vessel to Williams-McWilliams (127a-28a, 233a-34a, 247a-48a). National, therefore, will have nothing to do with the operation and will make no profit on this venture; its parent is simply to be paid a small administrative fee (by Williams-McWilliams) (161a, 166a, 201a, 203a). RBKW

and Stuyvesant are excluded from operating the vessel; and they are excluded from ownership (233a, 247a-48a). They can achieve neither of those two roles, nor anything whatever, by putting National under their control.

On the other hand, both RBKW and Williams-McWilliams have gone to great lengths to minimize the possibility that the $50 million bareboat charter hire would have to be shown on their books. To avoid that result, RBKW (through Stuyvesant) obtained an option to cancel the time charter at will (159a-60a) and Williams-McWilliams refused to accept the status of bareboat charterer (160a, 210a) (although it accepted the powers, duties and compensation of the bareboat charterer, 210a-11a). It is simply not credible that RBKW would risk losing the balance sheet protection it gains from its option to cancel the time charter, hard-won at the negotiating table, by participating in a side deal with USCC for control of National.

2. The undisputed fact is that National was formed in the interests and at the instance of the transacting parties, so as to enable the transaction to go forward—since no party wanted to reflect a $50 million liability on its balance sheet. This is a perfectly standard commercial use of a special purpose corporation (*see* 199a-201a), and the only reason for the formation of this one (160a-61a, 200a-01a; *see* 210a).

Thus, the question is, not who asked USCC to create National, but whether RBKW has made some secret, utterly worthless and palpably self-defeating side deal. If plaintiff's unsubstantiated surmise on this subject could be credited to defeat this motion, then any plaintiff could defeat any summary judgment motion by saying anything at all.

Rule 56 is not so impoverished. *E.g., First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289 & n.19 (1968); *Mosher v. Saalfeld*, 589 F.2d 438, 442 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979); *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978).

CONCLUSION

For the foregoing reasons, plaintiff's petition for a writ of certiorari should be denied.

October 6, 1980

Respectfully submitted,

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APPENDIX

APPENDIX "A"

SUBCHAPTER D—VESSEL FINANCING ASSISTANCE

Part 298—OBLIGATION GUARANTEES

§ 298.1 Purpose.

This Part prescribes regulations implementing the provisions of Title XI of the Merchant Marine Act, 1936, as amended by P.L. 92-507 (46 U.S.C. 1271-1279), governing Federal ship financing assistance.

§ 298.2 Definitions.

For the purpose of this part—

(a) "Act" means the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101-1294).

* * *

(d) "Closing" means a meeting of various participants or their representatives in a Title XI financing, at which a commitment to issue Guarantees is executed, or at which all or part of the Obligations are authenticated and issued and the proceeds are made available for a purpose set forth in section 1104(a) of the Act, or at which a Vessel is delivered and a Preferred Mortgage is executed as security to the Secretary.

* * *

(g) "Documentation" means all or part of the agreements relating to an entire Title XI financing which must be furnished to the Secretary, irrespective of whether the Secretary is a party to each agreement.

(h) "Guarantee" means the contractual commitment of the United States of America, represented by the Secretary, endorsed on each Obligation, to make payment to the Obligee or an agent, upon demand, of the unpaid interest on, and the unpaid balance of the principal of such Obligation, including interest accruing between the

date of default (described in § 298.40 of this Part) and the date of payment.

* * *

(k) "Letter Commitment" means a letter from the Secretary to an applicant for Guarantees, setting forth specific determinations made by the Secretary with respect to the applicant's proposed project, as required by the Act and regulations of this part, and stating the Secretary's commitment to execute Guarantees, subject to compliance by the applicant with any conditions specified therein.

(l) "Maritime Administration" means that agency created within the Department of Commerce by Reorganization Plan No. 21 of 1950 (64 Stat. 1273), amended by Reorganization Plan No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91-469 (84 Stat. 1036).

* * *

(t) "Secretary" means the Secretary of Commerce, acting by and through the Assistant Secretary of Commerce for Maritime Affairs, the Maritime Administrator or any official of the Maritime Administration to whom is duly delegated the authority, from time to time, to perform the functions of the Secretary of Commerce or the Assistant Secretary of Commerce for Maritime Affairs.

* * *

(w) "Vessel" means all types of vessels, whether in existence or under construction, including passenger, cargo and combination passenger-cargo carrying vessels, tankers, towboats, barges and dredges which are or will be documented under the laws of the United States, floating drydocks which have a capacity of at least thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treat-

ment, abatement or control vessels, which are owned by citizens of the United States.

§ 298.10 Citizenship.

(a) *Applicability.* Prior to acquiring a legal or beneficial interest in a Vessel financed under Title XI of the Act, the applicant and any other Person, (including, but not limited to settlors, owner trustees, owner participants, bareboat charterers and such charterers other than bareboat charterers whose charter exceeds the blanket approval period provided for in Part 221 of this Title 46), shall establish its United States citizenship, within the meaning of section 2 of the Shipping Act, 1916, (1916 Act), as amended, (46 U.S.C. 801-852), sections 37 and 38 of the Merchant Marine Act, 1920, as amended, (46 U.S.C. 861-889), and, as applicable, section 905(c) of the Act, unless the Secretary approves a non-citizen participation under the authority of sections 9 and 41 and Section 37, as applicable, of the 1916 Act. The Secretary will not approve an application providing for ownership of such Vessel by, or bareboat chartering of such Vessel to, a non-U.S. citizen. See also Part 221 of this Title 46 concerning the documentation, transfer or charter of vessels to non-U.S. citizens. Citizenship may also be required of any Person who does not have a legal or beneficial ownership in the Vessel if such Person is the operator or has authority to direct the operation of the Vessel on behalf of the Shipowner.

(b) *Prior to Letter Commitment.* The applicant and any Person identified in paragraph (a) of this section, who is required to establish United States citizenship shall, prior to the issuance of the Letter Commitment, establish United States citizenship in form and manner prescribed in 46 CFR Part 355.

(c) *After Letter Commitment.* Any Person who has become identified with the project, for a reason indicated in paragraph (a) of this section, and who has not previously established United States citizenship within the

prior twelve calendar months, promptly shall establish its United States citizenship in the form and manner prescribed in 46 CFR Part 355.

(d) *Supplemental proof.* Unless otherwise waived by the Secretary for good cause, at least 10 days prior to every Closing, all Persons identified with the project who have previously established United States citizenship in accordance with paragraphs (a) and (c) of this section shall submit pro forma Supplemental Affidavits of Citizenship which have previously been approved as to form and substance by the Secretary, and on the date of such Closing such Persons shall submit to the Secretary three executed copies of such Supplemental Affidavits of Citizenship evidencing the continuing United States citizenship of such Persons bearing the date of such Closing.

§ 298.11 Vessel requirements.

Each Vessel to be constructed, reconstructed or reconditioned and financed by issuance of Guarantees shall meet the following criteria:

(a) *United States construction.* The Vessel shall be constructed, reconstructed or reconditioned entirely in a shipyard or shipyards of the United States, within the meaning of section 505 of the Act, and, where practicable, only from articles, materials and supplies of the growth, production or manufacture of the United States, as defined in section 1401(h) of the Tariff Act of 1930 (10 U.S.C. 1401(h)). If an applicant for Guarantees elects to use foreign-source materials or components in the Vessel, the cost thereof shall not be included in the Actual Cost of the Vessel used as the basis for determining the amount of Guarantees, as set forth in § 298.21, except if the Secretary shall approve an application for waiver upon determining that:

(1) The article, material or supply is not customarily grown, produced or manufactured in the United States; or

(2) With respect to other than major components of the hull or superstructure, and any material used in the construction thereof, compliance with the United States origin requirement of this section would unreasonably delay completion of a Vessel beyond its contract delivery date, provided that the applicant submits evidence satisfactory to the Secretary that due diligence was employed to obtain materials of United States origin.

* * *

(c) *Class, condition and operation.* The Vessel shall be constructed, maintained and operated so as to meet the highest classification, certification, rating and inspection standards for vessels of the same age and type imposed by the American Bureau of Shipping (ABS), or such other standards as may be approved by the Secretary, and comply with all applicable laws, rules and regulations as to condition and operation, including, but not limited to, those administered by the United States Coast Guard, Environmental Protection Agency, Federal Communications Commission, Public Health Service, or their respective successors, and all applicable treaties and conventions to which the United States is signatory, including, but not limited to the International Convention for Safety of Life at Sea. All Vessels carrying passengers or freight shall be deemed to be carrying such passengers or freight for hire, and shall be inspected and certificated in accordance with the applicable United States Coast Guard regulations, if any, at the earlier of the delivery of such Vessel or Vessels and the initial Closing.

* * *

§ 298.12 Operator's qualifications.

No Letter Commitment shall be issued by the Secretary without a prior determination that the applicant, bareboat charterer, or other Person identified in the

application as the operator of the Vessel, possesses the necessary experience, ability and other qualifications to properly operate and maintain the Vessel or Vessels which serve as security for the Guarantees, and otherwise to comply with all requirements of this part.

§ 298.14 Economic soundness.

No Letter Commitment for Guarantees shall be given by the Secretary without finding that the proposed project, with respect to which the Vessel or Vessels are to be financed under Title XI, will be economically sound. In making the economic soundness finding, the Secretary shall consider, together with other factors, the market potential for the employment of the Vessel or Vessels over the life of the Guarantees, projected revenues and expenses of the operation, the length of the Guarantee period and any charters, contracts of affreightment, transportation agreements or similar agreements which will assure the employment of the Vessel or Vessels.

§ 298.32 Required provisions in Documentation.

* * *

(b) *Assignments and general covenants from Obligor to Secretary.* The Obligor shall assign rights and shall covenant with the Secretary, as required by the Secretary, including, but not limited to, the following:

* * *

(4) Covenants relating to the annual filing of satisfactory evidence of continuing United States citizenship, in accordance with 46 CFR 355; warranty of Vessel title free from all liens other than those specifically excepted; maintaining United States registry of the Vessel; compliance with the provisions of the Ship Mortgage Act of 1920; Notice of Mortgage, payment of all taxes (except if being contested in good faith); annual financial statements audited by independent certified or independent licensed public accountants;

* * *

§ 298.43 Applicability of the Regulations.

The regulations in this part shall be in effect as to all applications for commitments for Guarantees, commitments to guarantee Obligations and Guarantees of Obligations made, issued or entered into after the effective date hereof pursuant to section 1104(a) of the Act, and all mortgages and loans covered thereby. These regulations supersede those issued under Part 298 of this title (23 F.R. 384) as of the effective date hereof, but shall not affect any commitment for Guarantees, Guarantees or contracts of insurance in existence on the effective date of these regulations. The regulations in this part may be amended, but said amendments shall have no effect upon any existing Guarantees, insurance contracts, commitment for Guarantees or Documentation.

Supreme Court, U. S.
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Nos. 80-366 and 80-549

In the Supreme Court of the United States

OCTOBER TERM, 1980

GREAT LAKES INTERNATIONAL, INC., PETITIONER

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.

JACKMAN & COMPANY, ET AL., CROSS-PETITIONERS

v.

GREAT LAKES INTERNATIONAL, INC., ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether a domestic shipowner has standing to challenge a federal ship financing guarantee allegedly made in violation of the citizenship requirement of Section 1104(a)(1) of the Merchant Marine Act, 1936, 46 U.S.C. 1274(a)(1).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not reported. The oral opinion of the district court (Pet. App. 4a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1980. The petition for a writ of certiorari was filed on September 8, 1980. The cross-petition for a writ of certiorari was filed on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Sup. Ct. R. 19.5.

STATUTES INVOLVED

Section 101 of the Merchant Marine Act, 1936, 46 U.S.C. 1101, provides in pertinent part:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable * * *. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Section 1104(a)(1), Title XI, of the Merchant Marine Act, 1936, 46 U.S.C. 1274(a)(1), provides in pertinent part:

> (a) Pursuant to the authority granted under section 1273(a) of this title, the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> (1) financing * * * construction * * * of a vessel or vessels owned by citizens of the United States * * *.

STATEMENT

In December 1979, petitioner, a company engaged in dredging and marine construction operations in the United States and abroad, filed this suit in the United States District Court for the Southern District of New York. Petitioner's complaint concerned the proposed federal financing under Title XI of the Merchant Marine Act, 1936, 46 U.S.C. 1271 *et seq.*, of the construction of a large dredge to be owned by respondent United States Trust Company in trust for BameriLease Capital Corporation. Petitioner alleged that respondent Royal Bos Kalis Westminster Group N.V., a Dutch corporation, controls the prospective bareboat charterer of the dredge (National Dredging, Inc.) and that therefore the construction loan guarantee authorized by the Secretary of Commerce violates the citizenship requirement set forth in Section 1104(a)(1) of the Act, 46 U.S.C. 1274(a)(1).[1] Petitioner sought declaratory and injunctive relief.

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[1]Section 1104(a)(1) requires that the guarantee "aids in * * * financing * * * construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States." 46 U.S.C. 1274(a)(1). Vessel owner, for purposes of the citizenship requirement, is broadly defined to include a bareboat charterer and anyone who controls or owns a corporation that owns or bareboat charters the vessel. See 46 C.F.R. 298.10; see also 46 U.S.C. 802.

In pleadings filed in the district court, both the federal respondents and the private respondents controverted petitioner's claim, detailing the American citizenship of the owners of the dredge in question (R. 217a-223a, 226a-229a).[2] Subsequently, the respondents moved for summary judgment, contending that petitioner lacked standing because the financing guarantee would not cause petitioner any injury and because petitioner's alleged interest in avoiding competition is not within the zone of interests protected by the citizenship requirement of Title XI. On March 12, 1980, the district court granted respondents' motion for summary judgment. The court concluded that even assuming that petitioner could show competitive injury, that claim is not within the zone of interests protected by the citizenship requirements of Title XI (Pet. App. 5a-6a). The court explained (*ibid.*):

> [T]here is no evidence that Congress, in enacting Title XI, intended to protect anyone from competition or to create any monopolies.
>
> * * * * *
>
> The objective of Title XI * * * is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards. The citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war. To the extent that such requirements have not been complied with * * * the entire country is the loser and [petitioner] is no differently situated than any other citizen.

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[2] "Private respondents" refers to the non-federal respondents in No. 89-366 and cross-petitioners in No. 80-549. "R." refers to the joint appendix filed in the court of appeals.

The court of appeals affirmed. The court observed that the legislative history of Title XI shows that "[t]he purpose of the bill is to encourage the use of private capital in the financing of ship construction" (Pet. App. 3a, quoting H.R. Rep. No. 1042, 83d Cong., 1st Sess. 1 (1953)). Accordingly, the court of appeals held that "[petitioner's] interest in restricting competition is not an interest covered by Title XI" and that "therefore [petitioner] has no standing to bring this action" (Pet. App. 3a).

ARGUMENT

Petitioner contends (Pet. 8-19) that it has standing to contest the Secretary's decision to guarantee the financing of a dredge that may someday operate in competition with dredges owned or operated by petitioner.[3] Consistent with the purposes of Title XI of the Merchant Marine Act, 1936, 46 U.S.C. 1271 *et seq.*, in general, and the citizenship requirement of Section 1104(a)(1), 46 U.S.C. 1274(a)(1), in particular, both courts below properly rejected this claim. Those rulings, on a question of first impression, are consistent with this Court's decision in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), and with the decisions of other courts of appeals applying the "zone of interest" test in other contexts. Further review of this question is unwarranted.

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[3]Petitioner erroneously suggests (Pet. 16-17 n.*) that the district court "found that the constitutional requirement of injury in fact was satisfied." In fact, the district court merely assumed arguendo that petitioner satisfies that requirement. See Pet. App. 5a. On appeal, the government contended that petitioner's claims of injury were too speculative and attenuated to satisfy the injury in fact standard. The court of appeals did not reach that question, however.

The courts below correctly concluded that petitioner is not within the "zone of interests" (397 U.S. at 153) protected by the citizenship requirement of Title XI of the Merchant Marine Act. To be sure, Section 1104(a)(1) requires that financing guarantees be made only on behalf of vessels "owned by citizens of the United States," a requirement that the government believes has been fully satisfied here. Nothing in that language suggests, however, that Congress thereby sought to protect shipowners like petitioner from foreign competition. Rather, the citizenship requirement appears designed to effectuate the national interest in having an American fleet "to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, [and] capable of serving as a naval and military auxiliary in time of war or national emergency." 46 U.S.C. 1101(a) and (b).[4]

Indeed, other provisions of the federal maritime laws expressly create limited forms of competitive protection for the domestic fleet. Thus, Section 27 of the Jones Act, 46 U.S.C. 883, provides that only American flag ships built in the United States may operate in the domestic trade, thereby precluding vessels built abroad and operated at a lower cost from competing in the domestic market. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*,

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[4]Of course, foreign controlled ships are subject to removal from the American fleet at any time and thus do not serve the general purposes of the Act. But, as the district court pointed out, to the extent the Secretary failed to comply with the citizenship requirement in this case, "the entire country is the loser and [petitioner] is no differently situated than any other citizen" (Pet. App. 6a).

444 U.S. 572, 574-575 (1980).[5] Likewise, Section 506 of the Merchant Marine Act, 1936, 46 U.S.C. 1156, specifically limits competition between subsidized and unsubsidized American vessels in the domestic trade. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*, 444 U.S. at 575-590. But neither the Jones Act nor Title V of the Merchant Marine Act is at issue in this case. Moreover, because Title XI contains no similar provision regarding the protection of the fleet from unfair or foreign competition, the court of appeals correctly concluded that petitioner's "interest in restricting competition is not an interest covered by Title XI" (Pet. App. 3a).

Petitioner cites no legislative history in support of its claim that Title XI concerns competitive injury, and we are aware of none. To the contrary, the relevant congressional reports demonstrate that Title XI was enacted "to encourage the use of private capital in the financing of ship construction." H.R. Rep. No. 1042, 83d Cong., 1st Sess. 1 (1953). See H.R. Rep. No. 2168, 75th Cong., 3d Sess. 29-30 (1938) (the primary purpose of Title XI is to "induc[e] private capital to become interested, on a sound business basis, in financing the construction, reconstruction, and reconditioning of our domestic shipping, thereby lessening further demands on the Treasury"). Furthermore, the legislative history indicates that the citizenship requirement is designed not to limit competition, but "to * * * safeguard our Government and insure the control of ships being built in American shipyards, to prevent foreign interests * * * [and] any

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[5]Petitioner's reliance (Pet. 8-9, 14-16) on *Central Vermont Transportation Co.* v. *Durning*, 294 U.S. 33 (1935), is misplaced. That case, which was decided three years *prior* to the enactment of Title XI, merely recognizes that the purpose of Section 27 of the Jones Act is "to provide for the promotion and maintenance of an American merchant marine." 294 U.S. at 38.

foreign government [from] hamper[ing] us or get[ting] control in any way of our ships or of our shipbuilding industries." 56 Cong. Rec. 8026 (1918) (remarks of Chairman Alexander of the House Comm. on Merchant Marine and Fisheries regarding Sections 2 and 9 of the Shipping Act of 1916, ch. 451, 39 Stat. 729, 730-731 (the statutes from which the citizenship requirement of Section 1104(a)(1) is derived)). See H.R. Rep. No. 2168, *supra*, at 3-6, 29-30; H.R. Rep. No. 1277, 74th Cong., 1st Sess. 4-5, 8-9 (1935).

Petitioner contends (Pet. 19) that the decision of the court of appeals will "frustrate[]" "the purpose of the review provisions of the Administrative Procedure Act." The APA itself recognizes, however, that many agency decisions are not subject to judicial review. See 5 U.S.C. 701(a); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). Likewise, and consistent with the decision below, other courts of appeals have concluded that a competitor may not challenge the administration of a particular government program because he does not fall within the zone of interest protected by the relevant statute. See, *e.g.*, *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F. 2d 759, 764-766 (8th Cir. 1976); *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 865 (5th Cir.), cert. denied, 385 U.S. 815 (1966).[6] And here,

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[6]Petitioner erroneously suggests (Pet. 12-14) that there is a conflict among the courts of appeals on the proper application of the zone of interest test. As indicated above, there is no conflict with regard to the precise standing issue posed by this case. Moreover, the courts below considered both the general statutory scheme as well as the specific statutory section in question in applying the zone of interest test. Thus, even assuming that there is some difference among the courts of appeals regarding the zone of interest test, this case does not afford the Court an appropriate opportunity to resolve the alleged

Congress has made clear that "[a]ny guarantee, or commitment to guarantee, made by the Secretary of Commerce under this subchapter shall be *conclusive* evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee, or commitment to guarantee, so made shall be *incontestable*." 46 U.S.C. 1273(e) (emphasis supplied).

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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confusion. In reality, petitioner is simply dissatisfied with the zone of interest test altogether, notwithstanding this Court's recent reaffirmation of this prudential limitation on standing. See *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

DOJ-1980-10

No. 80-366

Supreme Court, U.S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GREAT LAKES INTERNATIONAL, INC.,
Petitioner,

—against—

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION; SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS AND DEPUTY ASSISTANT SECRETARY FOR MARITIME AFFAIRS; ROBERT J. PATTON, JR., SECRETARY OF THE MARITIME ADMINISTRATION; NATIONAL DREDGING, INC.; UNITED STATES CORPORATION COMPANY; JACKMAN & COMPANY; DAVID H. JACKMAN; STUYVESANT DREDGING, INC.; ROYAL BOS KALIS WESTMINSTER GROUP N.V.; WILLIAMS-MCWILLIAMS CO., INC.; UNITED STATES TRUST COMPANY OF NEW YORK AND WARBURG PARIBAS BECKER INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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In the

Supreme Court of the United States

October Term, 1980

No. 80-366

Great Lakes International, Inc.,

Petitioner,

—against—

Philip M. Klutznick, Secretary of Commerce of the United States of America; United States Department of Commerce, Maritime Administration; Samuel B. Nemirow, Acting Assistant Secretary of Commerce for Maritime Affairs and Deputy Assistant Secretary for Maritime Affairs; Robert J. Patton, Jr., Secretary of the Maritime Administration; National Dredging, Inc.; United States Corporation Company; Jackman & Company; David H. Jackman; Stuyvesant Dredging, Inc.; Royal Bos Kalis Westminster Group N.V.; Williams-McWilliams Co., Inc.; United States Trust Company of New York and Warburg Paribas Becker Incorporated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Preliminary Statement

This brief is respectfully submitted on behalf of petitioner, Great Lakes International, Inc., in reply to the briefs in opposition filed on behalf of private respondents

and the government. The private respondents raise issues other than the zone of interests, concerning injury in fact (Br. Opp. 9, 15, 19-23), the subject of a cross-petition, No. 80-549, which petitioner opposes for the reasons set forth in its brief in opposition thereto.

Argument

1. This case squarely presents the issue of the proper means of applying the zone of interests criterion. It is an important federal question, on which this Court has never spoken, and an issue as to which the courts of appeal are in conflict. This case is an appropriate one for consideration of this issue since it was the only issue reached by the courts below. The case is an important one for the dredging industry, and petitioner respectfully submits that it has a strong probability of success on the merits.

2. Respondents claim that the conditional letter of approval, setting forth the final determinations challenged herein, is immune from judicial review and "incontestable" by virtue of 46 U.S.C. § 1273(e). (Private respondents' Br. Opp. 11, 23-25; gov't Br. Opp. 8).* The issue was not decided by either court below. However, petitioner maintains that the legislative history of the provision,** the agency

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* The government raises this issue for the first time in this Court. Below, it was not certain whether its letter came within the purview of the statute, it failed to move for summary judgment on this ground, and it urged that the court not decide the issue. (R.30, Federal defendants' memorandum of law, at 10).

** *See To Facilitate Private Financing of New Ship Construction: Hearings on H.R. 8637 before the House Comm. on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. 19-22, 28-29 (1954); S. Rep. No. 92-1137, 92d Cong., 1st Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3851, 3858; H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 6 (1971). Review is proper until bonds are purchased.

construction of conditional letters of approval,* and the language of the "Commitment to Guarantee," ** execution of which is sought to be enjoined, all demonstrate that the letter in issue here is not a commitment to which the statute speaks.

3. Respondents suggest that petitioner challenges the validity of the zone of interests test. (Private respondents' Br. Opp. 18; gov't Br. Opp. 7-8 n.6). This is not the case. Petitioner's objection is only to the court of appeals' unprecedented manner of applying the test, and the district court's conclusion that petitioner lacks standing for reasons that are in direct conflict with this Court's holding in *Central Vt. Transportation Co.* v. *Durning*, 294 U.S. 33, 36-39 (1935). Petitioner submits that it is clear from the last clause of 46 U.S.C. § 861 that Congress intended Title XI to protect the interests asserted in this action. It is respectfully submitted that the failure of the courts below to recognize petitioner's standing resulted from this Court's silence on the standards for the proper application of the zone of interests criterion.

4. The confusion of the courts below in applying the zone of interests criterion is apparent from the fact that they identified three different interests intended to be protected by the statutes involved. The district court held, without apparent reference to legislative history, that the

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* *See* R.33, App. 4 to Plaintiff's Memorandum in Further Support of Its Motion for a Preliminary Injunction and in Opposition to Defendants' Motions for Summary Judgment, taken from the record on appeal in *United States ex rel. Greenberg* v. *Burmah Oil Co. Ltd.*, 558 F.2d 43 (2d Cir.), *cert. denied*, 434 U.S. 967 (1977). Such a letter does not set forth a "*final* and binding commitment."

** That document states ". . . the validity of this Guarantee Commitment shall be incontestable *from the date hereof*." (R.17, Ex. 2, Brown affidavit) (emphasis supplied).

objectives of Title XI were to build a strong American merchant marine for purposes of national defense and to provide jobs for American seamen and shipyards. (Pet. 6a). The court of appeals found that the purpose of Title XI was to encourage the use of "private capital in the financing of ship construction." (Pet. 3a). The court of appeals reached this conclusion solely on the basis of a House Report to a 1953 amendment to Title XI, an approach for which no party has found any precedent. Petitioner respectfully submits that, unlike the court of appeals below, the court of appeals for the District of Columbia circuit would not have looked at any legislative history in deciding the zone of interests question. *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 141-43 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Moreover, the court of appeals for the third circuit has seriously questioned the utility of the zone of interests inquiry. *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 582-83 n.28 (3d Cir. 1979).

5. Respondents state a general proposition that the competitive interests of competitors of parties benefited by governmental assistance programs are not within the zone of interests sought to be protected by such programs. They suggest that the disposition in the courts below, and *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977), are representative of that view. (Private respondents' Br. Opp. 10; gov't Br. Opp. 7).* Such a proposition conflicts with the

* Respondents also cite *Rural Electrification Administration, Inc.* v. *Central La. Electric Co.*, 354 F.2d 859 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966) and *Berry* v. *Housing and Home Finance Agency*, 340 F.2d 939 (2d Cir. 1965), which were decided under the "legal interest" test overruled in *Ass'n of Data Processing Service Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). The issue of competitor standing under environmental laws in *Clin-*

zone of interests holdings in *Rental Housing Ass'n of Greater Lynn, Inc.* v. *Hills*, 548 F.2d 388, 390 (1st Cir. 1977) (plaintiff landlords had standing under Community Redevelopment Act to challenge the award of H.U.D. financial assistance for housing in competition with them); *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 701 (5th Cir. 1973) (plaintiff small business had standing under Small Business Act to challenge minority set asides benefiting competitor), and *Armco Steel Corp.* v. *Stans*, 303 F.Supp. 262, 268 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779, 784 (2d Cir. 1970) (plaintiff steel manufacturer had standing to challenge approval of use of Foreign Trade Zone for vessel construction with competitor's steel in violation of Foreign Trade Zone Act and tariff acts). Respondents' position merely highlights the conflict between the decisions below and these decisions of the First, Second and Fifth Circuits.

6. Respondents' attempted distinction of *Central Vt. Transportation Co.* v. *Durning, supra*, on the ground that it preceded the passage of the Merchant Marine Acts of 1936 and 1938, does not remove the obvious conflict between the holding of that case and that of the district court below. This Court held that the citizenship requirement in

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ton Community Hospital Corp. v. *S. Md. Medical Center*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975), represents another "zone of interests" conflict among the circuits. *See, e.g., Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977); *Mobil Oil Corp.* v. *FTC*, 562 F.2d 170, 173 (2d Cir. 1977); *Robinson* v. *Knebel*, 550 F.2d 422, 424 (8th Cir. 1977); *Nat'l Helium Corp.* v. *Morton*, 455 F.2d 650, 655 (10th Cir. 1971). *Jus tertii* standing, the basis of the decision in *Hood River County* v. *United States Dep't of Labor*, 532 F.2d 1236 (9th Cir. 1976), is not in issue in this case. *Window Systems, Inc.* v. *Manchester Memorial Hospital*, 424 F.Supp. 331 (D.Conn. 1976) is irrelevant since the question there decided was whether or not a private cause of action may be inferred from a statute.

§ 38 of the Jones Act, 46 U.S.C. § 802, was intended by Congress to give effect to one of the nation's oldest policies, restated in 46 U.S.C. § 861, the protection of its domestic fleet from foreign competition.* 294 U.S. at 36-39. Respondents fail to suggest any reason why the purpose of 46 U.S.C. § 802 should have changed after it was incorporated by reference into the 1936 Act and Title XI, 46 U.S.C. §§ 1244(c), 1271(b), 1273(a) and 1274(a)(1), so as to serve only the interest of national defense, as the district court held. (Pet. 6a). Respondents' claim that the *Central Vt.* holding is limited to 46 U.S.C. § 883 ignores the fact that this Court's construction of that statute was based on the policy reflected in 46 U.S.C. §§ 802 and 861. The last clause of § 861 makes that policy the primary end to be attained in the administration of Title XI, and the other shipping laws under the jurisdiction of the Secretary of Commerce. From the statute itself, it is clear that petitioner's interest is arguably to be protected by the Secretary's administration of all the shipping laws, including Title XI. Respondents' attempt to divorce the protective purpose of the Jones Act from Title XI would render § 861 meaningless. Their claim that the Jones Act is irrelevant to Title XI (gov't Br. Opp. 6; private respondents' Br. Opp. 11-14), is thus without merit.

7. There is no lack of support in the legislative history of Title XI for petitioner's position that among the interests advanced therein is protection of American shipowners in the domestic coastwise trade from foreign competition,

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* *See also American Maritime Ass'n* v. *Blumenthal*, 458 F.Supp. 849, 856 (D.D.C. 1977), *aff'd*, 590 F.2d 1156 (D.C.Cir. 1978), *cert. denied*, 441 U.S. 943 (1979) (In § 861, Congress protected American shipowners from foreign competition); *Marine Carriers Corp.* v. *Fowler*, 429 F.2d 702, 708 (2d Cir. 1970) (the policy of § 861 is ". . . unabashedly protectionist. . . .")

for its was intended primarily to benefit those shipowners.* Indeed, the impetus for H.R. 8080, which became Title XI, was that prior to 1938 the only advantage afforded to shipowners in domestic trade was the Jones Act ban on foreign competition, and that additional assistance was needed. *See* Hearings, *supra*, at 54 and 60. Congress was well aware when it passed Title XI in 1938, that it was thereby supplementing the body of maritime law directed to protecting American shipowners from foreign competition in the domestic trade. *See* H.R. Rep. No. 2168, *supra*, at 8 (quoting Chairman Kennedy). The last clause of 46 U.S.C. § 861 specifically directs that the administration of the program be in accordance with that protective intent. The fact that Title XI was later amended to facilitate financing under the program, as set forth in the legislative history relied upon by the court of appeals (Pet. 3a), simply does not, and could not, detract from that intent.**

8. Petitioner does not contend that the government vessel financing assistance programs, including Title XI, are intended as charity toward domestic shipowners, and does not dispute Congress' ultimate purpose, to build up a strong and economically sound Merchant Fleet for purposes of

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* *See Federal Mortgage Insurance to Aid in Ship Construction and Reconditioning: Hearings on H.R. 8080 before the House Comm. on Merchant Marine and Fisheries*, 75th Cong., 1st Sess. 8, 15 and 33 (1937) (hereinafter "Hearings"); H.R. Rep. No. 1950, 75th Cong., 3d Sess. at 30 (1938); H.R. Rep. No. 2168, 75th Cong., 3d Sess. 29-30 (1938).

** Private respondents' argument (Br. Opp. 8 n.8), that still other and later amendments corroborate the court of appeals' conclusion, is not only irrelevant, but is also inaccurate. The 1954 amendments, Pub. L. No. 83-781, 68 Stat. 1267, 83d Cong., 2d Sess. (1954), which changed Title XI from a mortgage guarantee to a loan guarantee program, were not part of the 1953 Act, the legislative history of which formed the basis of the court of appeals' decision. (Pet. 15).

national defense, to create employment and to facilitate commerce. Petitioner merely maintains that the United States has always recognized that, in order to achieve those ultimate goals, it is necessary to protect domestic shipping from foreign competition. Petitioner contends that in the last clause of 46 U.S.C. § 861, Congress directed the Secretary of Commerce to implement this policy in his administration of the Title XI program. The analysis employed below, which rendered that provision meaningless, cannot be said to have adequately described the intention of Congress. It is respectfully submitted that this Court should end its silence on the issue, to provide the lower courts with the proper standard for their application of the zone of interests criterion.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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